THE

AMERICAN

Law Journal and Miscellany.

No. IV.

Supreme Court of the United States.

FEBRUARY TERM, 1808.

David Alexander, *v.* the Baltimore Insurance Company.

Opinion of the Court.

ESPERANCE—ABANDONMENT. The Underwriter upon a vessel does not undertake for the cargo; he engages only for the ability of the vessel to perform her voyage, not that she shall perform it at all events; and to bear any damage which she may sustain during that voyage.

THIS action was brought against the underwriters to recover the amount of a policy of insurance on the *John* and *Henry*, from *Charleston* to *Port Republican*, or one other port in the *Bite of Leogane*. On the 3d *October*, 1803, the *John* and *Henry*, while prosecuting her voyage, was seized, by a *French* privateer, and carried into the port of *Mole St. Nicholas*, where the cargo was taken by *M. de Noailles*, the French commandant, for the use of the garrison. On the same day, the captain of the vessel, received a written engagement from *M. de Noailles* to pay for the cargo in coffee, after which the vessel was unladen. The captain remained at the *Mole*, in expectation of receiving payment, until the 29th of *October*,

when he sailed in the *John* and *Henry* for *Cape Francois*, with an order on that place for payment in coffee. On the 4th of *November*, she was seized, by a *British* squadron, then blockading *Cape Francois*, and condemned as prize. *Cape Francois* is not in the route to *Port Republican*, nor to any port in the *Bite of Leogane*, nor in the route to return from *Mole St. Nicholas* to the *United States*. The abandonment was made in *December*, on account of the capture by the *French* privateer. The declaration claims the amount of the policy in consequence of that capture.

It has been decided in this court, that during the existence of such a detention, as amounts to a technical total loss the assured may abandon: but it has also been decided that the state of the fact must concur with the state of the information to make this abandonment effectual. The technical total loss, therefore, occasioned by the capture and detention at the *Mole St. Nicholas* must have existed in point of fact in *December*, when this abandonment was tendered, or the plaintiff cannot proceed in this action.

Previous to that time the vessel had been restored to the captain, all actual restraint had been taken off, and it does not appear that the ability to prosecute her voyage was, in any degree impaired. But her cargo had been taken by *M. de Noailles*, the commandant at *Mole St. Nicholas*, and had not been paid for. The restoration of the vessel without the cargo is said not to terminate the technical total loss of the vessel.

The policy is upon the vessel alone and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The underwriters insure against the loss or any damage to the vessel, not against any loss or damage to the cargo. They insure the ability to perform her voyage, not that she shall perform it.

If in such a case, a partial damage had been sustained, no person would have considered the underwriters as liable for that partial damage; why then are they responsible for the total destruction of the cargo? It is said, by taking out the cargo, the voyage is broken up. But the voyage of the vessel

is not broken up; nor is the mercantile adventure destroyed from any default in the vessel. By this construction, the underwriter of the vessel, who undertakes for the vessel only, is connected with the cargo, and made to undertake that the cargo shall reach the port of destination in a condition to answer the purposes of the assured. Yet of the cargo he knew nothing, nor does he make any inquiry concerning it.

If it be true, that the technical total loss was not terminated until the cargo was paid for, because the voyage was broken up, then the underwriters would have been compellable to pay the amount of the policy, although the vessel had returned in safety to the *United States*. To prosecute the voyage, it is said, had become useless, and therefore the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, it would not be less true, if, instead of proceeding to *Cape Francois*, the *John* and *Henry* had returned from *Mole St. Nicholas* to the port of *Charleston*. The contract then, instead of being an insurance on the ability of the ship to perform her voyage, an insurance against the loss of the ship upon the voyage, would be a contract to purchase the vessel at the same mention in the policy, if circumstances not produced by any fault or disability in the vessel, should induce the captain, or the assured, to discontinue the voyage after it had been undertaken.

This is termed, pushing a principle to an absurdity, and therefore no test of the truth of the principle. But if it be a case which would occur as frequently as that which has occurred, and if the result which has been stated flows inevitably from the principle insisted on, the case supposed merely presents that principle in its true point of view, deprived of the advantages which it derives from its being adapted to the particular and singular case under argument. Either the technical total loss of the ship did or did not terminate when she was restored to the master uninjured, and as capable of prosecuting her voyage as when she sailed from the port of *Charleston*. If it was then terminated, this action cannot be sustained.

If it was not then terminated, on what circumstances did its continuance depend? At one time it is said to depend on the ability or inability of the owner to employ her to advantage. But this position requires a very slight examination to be discarded entirely. So far as respected the vessel herself and her crew, she was as capable of being employed to advantage as ever she had been. Only the funds were wanted to enable her to purchase a return cargo on the spot, or to proceed to her port of destination, and there purchase one. Or she might have returned immediately to the *United States;* and if any direct loss to the vessel was sustained by being turned out of her way, that, after restoration, would be a partial not a total loss. Besides, what *dictum* in the books will authorize this position? And what rule is afforded to ascertain the degree of inconvenience which, when in point of fact the vessel was in safety, in full possession of the master, and capable of prosecuting her voyage, shall warrant abandonment?

No total loss of the vessel, then, existed after her restoration, so far as that total loss depended upon the incapacity of the owner to employ his vessel to advantage. If the total loss continued after the restoration, that continuance was produced singly by the nonpayment for the cargo which is said to have broken up the voyage. If then the vessel had returned to a port in the *United States*, the voyage would still have been broken up, and the right to abandon would have been the same as it was while she was in the full possession of the captain.

But it is apparent that the captain had terminated the voyage on which the vessel was insured. Had his contract with *de Noailles* been complied with at *Mole St. Nicholas*, or at *Cape Francois*, he would not have proceeded to the *Bite of Leogane*. Had it not been complied with he would have had no more inducement to go to the *Bite of Leogane* from *Cape Francois* than from *Mole St. Nicholas*. The voyage to *Port Republican*, then, which was the voyage insured, was completely terminated at *Mole St. Nicholas;* the voyage to *Cape Francois*, in making which, he was captured, was a new voyage

undertaken, not for the benefit of the underwriters of the vessel, but for the benefit of the owners and underwriters of the cargo. Consequently, so far as respects the underwriters of the vessel, who insured only the voyage to the *Bite of Leogane*, the capture at *Cape Francois* is an immaterial circumstance; and the technical total loss, by carrying the vessel into *Mole St. Nicholas*, was either terminated when she was restored without her cargo, or would have continued had she returned to an *American* port without her cargo.

Upon principle, then, independent of authority, it is very clear that the underwriter of the vessel does not undertake for the cargo; but engages only for the ability of the vessel to perform her voyage, and to bear any damage which the vessel may sustain in making that voyage.

But it is contended that adjudged cases have settled this question otherwise.

The case has frequently occurred, and a direct decision might be expected on it, if a construction so foreign to the contract had really been made. It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged. Not an instance is recollected in which the right to abandon in such a case, after the vessel was restored, has been claimed. Yet if the loss of the cargo amounted to a destructiou of the voyage, so far as respected the vessel, and thereby created a total loss of the vessel herself notwithstanding her restoration to the captain uninjured, and in full capacity to prosecute her voyage, and such claims would be frequently asserted, and vessels would be valued high in the policy for the purpose of selling them on a contingency which so often occurs. It would be strange indeed to admit, that if this cargo had been condemned in *Mole St. Nicholas*, and the vessel had been liberated, the right to abandon would not have been produced by the loss of the cargo, and yet to contend that nonpayment does not produce that right.

In recurring to precedent, no direct decision by a court on the point, no affirmance of the principle has been adduced; but the counsel for the plaintiff relies upon general *dicta* in the

books, which are used in reference to other principles. Thus, in 1 *Term Rep.* judge *Buller* says "it is an insurance on the ship for the voyage. If either the ship or the voyage be lost, it is a total loss."

In that case, the counsel for the plaintiff contended that the insurance was on the ship and on the voyage, and insisted that, as the vessel returned unfit for use, it was a total loss. The counsel for the defendants was stopped, and judge *Buller* said, "allowing *total loss* to be a technical expression, the manner in which the plaintiff's counsel have stated it, is rather too broad." Why too broad? The judge answers, "it has been said that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it, is this: it is an insurance on the ship, for the voyage. If either the ship or the voyage be lost, it is a total loss."

In what consists the difference between an insurance on the ship *and* the voyage which is laying down the principle too broad, and an insurance upon the ship *for* the voyage, which is the true way of considering it. If the destruction of the voyage, by the loss of the cargo, is a loss of the ship, then it is an insurance upon the ship and the voyage. But this, according to judge *Buller*, is not the true principle. The true principle is, "an insurance on the ship for the voyage." That is, that the voyage shall not be destroyed by the fault of the ship; or, in other words, that the ship shall be capable of making her voyage. And when he says, that if either be lost, it is a total loss, he must be understood to mean, if the voyage be lost by the happening to the ship of any of the perils insured against. To understand judge *Buller* otherwise, would be to make him inconsistent with himself: to illustrate a proposition by cases incompatible with that proposition, is, to support a distinction by cases which confound the principles intended to be distinguished from each other.

But these expressions are used in a case in which the whole contest respected the damage actually sustained by the ship insured, and must be understood in reference to such a case.

So in 1 *Term Rep.* 615, *Buller* says, "a total loss is of two sorts: one where, in fact, the whole of the property perishes," that is, the property insured; "the other where the property exists; but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it."

This was a case in which the cargo, which was the thing insured, was, by one of the perils insured against, prevented from reaching its destined port, and was greatly damaged. The expressions must be explained by the case, for the case itself is in view when the expressions are used.

A *dictum* of judge *Buller* in 1 *Term Rep.* 310, is more applicable to this case than either of those before quoted. He says, "if the ship had arrived and the goods had been lost, the assured could not have recovered." That was an insurance upon the arrival of the ship. It is said that that *dictum* was founded on its being a wagering policy, but it appears to be a construction of the term *policy*. He proceeds to say, that in policies on interest, if the voyage be lost, it is not necessary to proceed on with the hulk of the ship. But to what case does this apply? to an insurance upon goods or upon the ship? to a loss of the voyage, by default of the thing insured and abandoned, or by default of the thing not insured? The *dictum* is too vague, and too unsatisfactory, to form the basis of a great legal principle, of infinite importance in commercial transactions. If that case be read throughout, *dicta* may be found interspersed through it, that militate against the doctrine which this single sentence is supposed to support.

In the case of *Goss* and *Withers* there were two policies, one on the ship and the other on the cargo. The language of lord *Mansfield* in delivering the opinion of the court, with respect to the ship, does not even insinuate the idea that any damage sustained by the cargo would have affected the policy on the ship.

In deciding on the claim for the cargo, his language is to be considered with reference to the case itself. It does not appear whether, in the passage quoted from *Le Guidon*, the author of that work was treating of an abandonment as to the ship or

the cargo, or both. Nor does it in any degree, tend to establish the principle contended for, that, after stating the actual total loss of the goods, lord *Mansfield* mentions, as an additional circumstance, showing the complete destruction of the voyage, that the ship was lost also.

In the case of *Hamilton* v. *Mendez*, neither the ship nor the cargo was lost. Lord *Mansfield* puts cases in which there might be a total loss; but those cases are not stated with such precision as to throw any light on the present question. He says it does not absolutely follow that because there is a recapture the loss ceases to be total. "If the voyage is absolutely lost or not worth pursuing;" and in many other instances, the owner may disentangle himself and abandon notwithstanding there has been a recapture.

It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings and, at best, but inexplicitly stated, as establishing important law principles. Let the *dictum* in the present case be examined. Suppose the ship and cargo to be owned by different persons, and insured by different underwriters. If the voyage be lost by the infirmity of the ship, an abandonment may unquestionably be made. If the goods be damaged or injured so as to occasion a technical total loss, so as to render the voyage not worth pursuing by the owner of the vessel, the value of the cargo does not affect him nor injure his vessel. With respect to him, the voyage is not destroyed. These *dicta* of lord *Mansfield* are uttered in terms which demonstrate that no case, like the present, was in his view at the time, and they are not adapted to such a case.

The cases from *Wescott* are of a peculiar kind. They are in the nature of wager policies, and the nature of the undertaking is said to be, that the ship shall perform her voyage in a reasonable time. "In these two last kinds of policies," says *Wescott*, "valued free from average," and interest or no interest, it is manifest, that the performance of the voyage, or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo is the object of the insurance." This remark

applies only to policies of the particular specified description: and even with respect to them, it would not appear that the fate of the ship depended on that of the cargo. In illustration of this principle, he states the case of the *Ludlow Castle*, insured from Jamaica to England. She was compelled by one of the perils insured against to put into Antigua, where she was stopped from proceeding on her voyage, and her cargo was sent to England in another vessel. At the time of the abandonment, and even after the time of the trial, the vessel had not arrived in England, and was not restored to the owner. In this case, the voyage was lost by the inability of the vessel to prosecute it.

The case of the *Sarah Galley* bears a much stronger resemblance to that under consideration, but is not so fully stated as to give the court all its circumstances. It does not precisely appear what damage was sustained by the seizure at *Gibraltar*, nor what effect that loss might have on the jury; nor, are we informed at what time and for what cause the abandonment was made.

But the great objection to that case is, that it was the verdict of a jury, not the solemn decision of a court; which verdict was rendered at a time when the law of insurance was not settled, and most probably, on a point which has since been overruled in England, and in this country. The loss of the ship on a voyage from *Gibraltar* to *Dunkirk* could not be the fact on which the plaintiff recovered, because that was a voyage not within the policy. The seizure at *Gibraltar* was the fact on which the jury founded their verdict. The defendant contended that this total loss was terminated by the restoration of the ship. "Yet as the taking at *Gibraltar* was a taking whereby the return voyage was prevented; a special jury gave the plaintiff a verdict for a total loss." The verdict then is found, not upon the subsequent actual loss of the vessel, but on the technical loss occasioned by the seizure. This verdict was rendered in the reign of *George* II. At that time it was doubtful whether a technical total loss, occasioned by a capture, did not vest in the assured a right to abandon,

which right was not devested. In the case of *Hamilton* and *Mendez*, which came on afterwards, this point was perseveringly maintained at the bar, and settled by the court. Had the case of the *Sarah Galley* been decided after the case of *Hamilton* and *Mendez*, a different verdict must have been rendered. But this decision was given exclusively on the circumstance which had befallen the ship, without a view, so far as is stated, to any loss of the cargo, and is considered by *Miller*, 288, as not being law.

The case of the *Anna* turned entirely upon the inability of the ship to prosecute her voyage.

The case of the *Despatch Galley*, is a case in which we are not informed of the amount of loss occasioned by capture and recapture; and is also a case decided before that of *Hamilton* and *Mendez*, most obviously upon the principle that the right to abandon which was vested by the capture, was not devested by restoration of the vessel. This case serves to show that the verdict in the case of the *Sarah Galley* did not turn on the subsequent loss of the vessel; for this vessel was not lost. There is, in it, no allusion to any influence which the loss of a cargo might have on the insurance of a vessel.

The COURT can find, in the books, no case which would justify the establishment of the principle, that the loss of the cargo constituted a technical loss of the vessel, and must, therefore, construe this contract according to its obvious import. It is an insurance on the ship and the voyage. It is an undertaking for the ability of the ship to prosecute and to bear any damage, which she may sustain during the voyage; not an undertaking that she shall, in any event, perform the voyage.

It is the unanimous opinion of the Court that the judgment must be AFFIRMED WITH COSTS.

The Attachment Law of New-York.

WHENEVER any person, other than those who may be liable to be declared bankrupts under the laws of the *United States*,* being indebted within this state, either secretly departs from or keeps concealed within it, any one creditor or joint company to whom he is indebted in the sum of one hundred dollars or upwards, or any two to whom he is indebted in the sum of one hundred and fifty dollars or upwards, or any three to whom he is indebted in the sum of two hundred dollars or upwards,† over and above all discounts, may apply to a judge of the supreme court, and make oath or affirmation in writing, that the debtor is indebted in one of the sums before mentioned, or in any sum exceeding the same, over and above all discounts, and that he or they do verily believe that he is departed this state or concealed within it, with intent to defraud his creditors, or to avoid being arrested by the ordinary process of law. The departure or concealment must be proved to the satisfaction of the judge by two witnesses. On such proof,‡ the judge issues his warrant to the sheriff of any one or more of the cities and counties, commanding him to attach the estate real and personal of the debtor within his county, with all books of account, vouchers and papers relating thereto; which warrant the sheriff shall execute, and with the assistance of two substantial freeholders make a true inventory of the estate, and return the same, signed by himself and the two freeholders, to the judge who issued the warrant.

* There is no such law now in force.

† For all demands arising *ex contractu*, though the amount be unliquidated, an attachment may be issued against the property of absconding and absent debtors under this act. 3. *N. Y. T. R.* 323.

‡ Under this act the supreme court will inquire into the foundation of the demand of the plaintiff, and if it appear not to be such as to warrant the issuing an attachment, will order a *supersedeas*. 3 *N. Y. T. R.* 257.

The judge immediately thereafter orders notice to be given in two public newspapers of this state, one of which to be printed in the city of New-York, and the other by the printer to the state, that on application he had directed all the estate of such debtor to be seized, and that unless he return and discharge his debts within three months after such notice, the estate will be sold for the payment of his debts.

In case any sheriff seizes perishable goods, the judge who issued the warrant may, in his discretion, order such goods to be sold, and the monies arising therefrom to be paid to the trustees to be appointed in pursuance of the act.

If a sheriff seizes any goods or effects which are claimed by a person as his property, such sheriff may summon and swear a jury to try the right; and if the jury by inquisition find it to be in the person so claiming, or in any other person than the debtor, the sheriff must deliver the goods or effects to the person, &c. and he is not liable to prosecution for such seizure. All reasonable charges arising by the sale of such perishable goods or by the inquest, if it find the property not to be in the debtor, are allowed and certified by the judge issuing the warrant and paid out of the estate of the debtor; but if the property of the goods or effects be found in the debtor, then all charges arising by such claim and inquisition, or either of them, must be paid by the person who made the claim, or procured or occasioned the inquisition.

If a person indebted to the debtor, or having the possession of any of his property, after the first public notice pays any debt or delivers such property to the debtor, his attorney or assigns, he is deemed to have done it fraudulently, and is answerable for the value to the trustees. If sued for the same, after the first public notice by the debtor, he may plead the general issue and give this act and the special matter in evidence.

All sales of the estate real or personal of the debtor, and all assignments of any bill, note or other chose in action belonging to him, made after the first public notice, are null and void.

If the debtor, before the appointment of trustees, by himself or attorney, by petition to the judge, offer to prove to the court of which he is a judge in open court, that he is a resident within this state and was not within thirty days before issuing the warrant nor at any time after, nor is then absconding or concealing, and pray that he may be heard at the next term of the court, and if, at the same time, he execute and deliver to the creditor or creditors who procured the warrant a bond with sufficient security, to be approved of by the judge, in the sum of one hundred dollars, with a condition that the debtor shall prove to such court at the then next term the facts offered in the petition to be proved, and which are to be stated in the condition, the judge in such case reports his proceedings to the court at the next term. The court is authorized to compel the parties and their witnesses to come in, and to hear the proofs and allegations in a summary way, and to determine whether the matters in the petition have been satisfactorily proved. If the court determine that they have, they then grant a *supersedeas* to such warrant or warrants, and the debtor recovers his costs, to be taxed by the court in open court, of the creditor or creditors who procured the warrant or warrants. But if the court determine the matters in the petition not satisfactorily proved, then the obligee or obligees in the bond may recover the penalty with costs, the one moiety of such penalty to the use of the obligee or his legal representatives, and the other to be paid to the trustees, to be by them distributed in like manner as other monies which may come to their hands as trustees.

If the debtor do not return within three months after such notice, and satisfy his creditors, not having presented the petition or given the bond or having done the same, and the court shall have adjudged the matters in such petition not satisfactorily proved, and shall have refused to grant a *supersedeas*, in either of these cases, the judge who issued the warrant, or any other judge of the same court, appoints three or more persons to be trustees for all the creditors of such debtor; which trustees shall before they proceed, take an oath

or affirmation, to be administered by the judge appointing them, well and truly to execute the trust by that appointment reposed in them, according to the best of their skill and understanding.

The trustees or any two of them, as soon as may be thereafter, give notice in two of the newspapers printed in this state, one of which to be printed in the city of New-York, and the other by the printer to the state, of their appointment, and require all persons indebted to the debtor, by a day certain to be mentioned in the notice, to pay all debts and sums of money which they owe to the debtor, and deliver all his property which they have in possession to them; and also to desire all creditors, by a day to be mentioned in the notice, to deliver to them or one of them, their respective demands.

Each of the trustees may take into their hands all the estate of the debtor, whether attached or afterwards discovered, and all books, vouchers and papers relating to the same. The trustees, from their appointment, are vested with all the estate of the debtor, and are capable to sue for it. All debts and things in action, due or belonging to the debtor, and all the estate attached by the sheriff, who took the same, must be delivered over to the trustees, and the trustees or any two of them, must sell at public vendue, after fourteen days' previous notice of the time and place, all the estate real and personal of the debtor as shall come to their hands, and execute deeds and bills of sale.

If a person indebted to the debtor, or having the custody of property belonging to him, do not deliver a just account thereof to the trustees, or one of them, by the day appointed, he forfeits double the sum of the debt, or value of the property; to be recovered by action by the trustees. The court before whom such action shall be brought, is empowered to compel the person to appear and be examined on oath touching the premises, and to commit such person to prison if he refuse to be examined; or being examined, refuse to answer satisfactorily.

The trustees may apply to any justice of the peace for a warrant, commanding the debtor and every other person known or suspected to detain any part of his estate, or to be indebted to it, or to know any thing concerning the concealment or embezzlement thereof, to be brought before him at such place as he and the trustees shall appoint, the justice, or in his absence, any other justice to be requested by the trustees, shall be present. At this meeting either the justice or the trustees, or both, may examine on oath to be administered by the justice, every person so brought before them, touching all matters relative to the debtor, his dealings, and his estate, and reduce the examination to writing, which the person is required to sign. If he refuse to be sworn or to answer, or shall not answer to the satisfaction of the justice, all lawful questions to be put by the justice and trustees, or the major part of them present, as well by word of mouth as by interrogatories in writing, or shall refuse to sign the examination, not having any reasonable objection either to the wording thereof or otherwise, to be allowed by the justice, the justice may commit him to prison, there to remain without bail, until he submits. The warrant of commitment must specify the particular default; and if it be in not answering a question, that question must be specified in the warrant: if he bring a *habeas corpus*, to be discharged from imprisonment, and on the return of it, there appear any insufficiency in the form of the warrant, the court or judge before whom he is brought, recommits him, unless it be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination; and if he be wilfully suffered to escape, the gaoler forfeits to the trustees a sum equal to what is owing to the creditors; *Provided*, it does not exceed two thousand five hundred dollars, to be sued for by them and distributed as herein after directed.

The survivor of the trustees has all the powers given to the trustees; and if any person, so to be examined, swears or affirms falsely, he is liable to the penalties of perjury.

Any person, other than those who have the effects in possession, who discovers any secreted effects of the debtor, so that they be recovered by the trustees, is entitled to ten per cent. on the value of them.

The trustees, or any two of them are empowered to settle all accounts between such debtor, and his debtors or creditors, and to examine any person on oath concerning the same, which oath may be administered by any of the trustees, two of them being present.

In case a controversy arises concerning a claim by a creditor or concerning a debt claimed by the trustees as such, they, or any two of them, may have it determined in this manner: The trustees, or any two of them, may nominate two indifferent persons, and the other party may nominate two indifferent persons, whose names are to be separately written on four pieces of paper, of one size and figure. These are to be rolled up separately in the same manner and put into a box; and from thence one of the trustees draws out three of them; and the persons, whose names are so drawn, finally settle the controversy. If a referee so appointed refuse or be incapable to act in a reasonable time, a new choice is made in the same manner. If the other party to the controversy refuse to nominate referees, any two of the trustees may nominate for him.

The trustees convert the estate into money; and any two of them, by public notice in two of the public newspapers, request a general meeting of the creditors to see the debts due to each ascertained, at a certain time and place to be specified in the notice, not less than two nor more than three months thereafter, nor more than one year and a half from the time of their first appointment at this meeting, or other adjourned meeting, if necessary, when all accounts are fairly adjusted, the trustees proceed to make distribution among the creditors in proportion to their respective just demands, first deducting all legal charges and commissions; in the payment no preference is allowed to debts due on specialties. If the whole of the estate be not then distributed, the trustees or any two of them within one year after, make a second divi-

dend of all such monies as shall have come to their hands after the first division, and so from year to year, until a distribution shall have been made of all the estate; and the surplus, if any, after all just debts and legal charges are satisfied, is paid to such debtor or his lawful representatives.*

A person who may have given credit to a debtor, on a valuable consideration, for a sum of money not due at the time of the distribution but which is payable afterwards, is considered as a creditor and receives his dividend, on deducting therefrom a rebate of legal interest.

If a creditor neglect or refuse to give notice of, or deliver to the trustees an account of his demand, or, if having a controversy relating thereto, or concerning the estate of such debtor he refuse to settle it with the trustees in the manner before directed, until after distribution, such creditor is not entitled to a dividend, and the monies in hand are divided among the other creditors; but if the creditor complies before a second distribution then he receives the sum he would have been entitled to on the first distribution before any second dividend is made. A creditor residing out of this state is deemed a creditor within the act; and his attorney, on producing a letter of attorney, duly authenticated, and legal proof of his demand, may proceed and act in the same manner as if the creditor were present.†

* In the case of *Peck* v. *Randall*, *May* 1806, the supreme court decided that the creditor cannot maintain a suit at law for his debt, against the trustees appointed under this act before the demand has been adjusted and the dividend declared. The proper remedy is by petition to the equity power of the court, under which the proceedings are instituted, who will either compel the trustees to do their duty or advise them in cases of doubt or difficulty. The trustees may plead the statute of *Limitations* in the same manner as the debtor himself could have done. 1 *N. Y. T. Rep.* 165.

If an absent debtor's estate be by the trustees admitted to have a surplus after payment of all demands, and retaining a part in hand sufficient to answer demands that may come against it, the court will order part to be paid either to the debtor or his agent. *In re* Paul R. Randall. 1 *N. Y T. R.* 513.

† A person who has been merely transiently within the state cannot be proceeded against as an absconding or concealed debtor, and to authorize proceedings against him the creditor who institutes them must be evidently within the state. If a debtor do not actually reside within this state, though

If a debtor before the appointment of trustees, apply in person or by attorney, to the judge who issued the warrant, and gives such security as the judge shall approve to the creditor at whose instance the warrant was issued, to appear and plead to any action, to be brought in any court of law or equity in this state, within six months thereafter, against him by such creditor, and to pay such sum as may be recovered, the judge issues a *supersedeas* to the warrant. Where a vessel or part thereof is attached, the judge who issued the warrant may cause the vessel or part to be valued by indifferent men, and if any person will give security, to be approved by the judge, to the people of this state for the benefit of the creditors of the debtor, to pay the amount of such valuation to the trustees, the judge will cause the vessel to be discharged from the attachment.

Where a debtor dies after the time fixed for his appearance, the proceedings go on to a final conclusion and with equal validity as if he had lived.

The estate real and personal of every debtor who resides out of this state and is indebted within it, is liable to be attached and sold for the payment of his debts, in like manner as the estates of debtors residing within this state. But instead of proof of absconding or concealment the creditor applying makes proof by two witnesses, to the satisfaction of the judge, of the residence of the debtor out of this state; and in every such case no trustees are appointed until the expiration of one year after public notice.

The first judge of the court of common pleas in each county and the mayor and recorder of the city of *New-York*, and every of them, may put this act in execution in their respective counties. Where warrants are issued by either of them, and also by a judge of the supreme court, the judge of the supreme court awards a writ of *certiorari* to the judge of the court of common pleas or mayor's court, as the case may

he lead so roving a life as to render it very difficult to fix his domicil, his being transiently here will not make him a resident within the meaning of the act. 2 *N. Y. T. R.* 318.

be, to remove the proceedings before him, so that he may proceed upon both warrants or either of them.

The judge, mayor or recorder who issues a warrant makes report to the court of which he is judge, of all the proceedings had before him out of court under this act, and causes that report to be entered in the minutes of the court. Such report or the entry thereof is full and conclusive evidence in all courts of record of the facts so reported. He causes the affidavits of the creditors, within thirty days after taking them, and the warrant with the sheriff's return, within thirty days after the return, to be filed in the office of the clerk of the court whereof he is judge, and the clerk marks thereon the day and year of filing them.

The judge appointing trustees at the request of any one of them, indorses on the appointment an allowance that the same may be recorded; which allowance, signed by a judge of the supreme court, is a sufficient authority to the secretary of the state and to the clerk of any county to record it; if signed by the judge of the court of common pleas or mayor's court, it is a sufficient authority to the clerk of the court whereof he is judge to record it. An appointment of trustees, or the record thereof is conclusive proof in all courts that the debtor therein named was at the time absconding, concealed or absent, within the meaning of this act; and that the appointment and proceedings previous thereto were regular. If the trustees sell any real estate of the debtor, they then cause their appointment duly proved or acknowledged and allowed, to be recorded either in the secretary's office of this state or in the clerk's office of the county where the land lies.

The trustees keep a regular account of all monies received by them, to which every creditor interested may at all reasonable times have recourse. The trustees are subject to such order for the more effectual execution of this act, as shall be made in the court of which the person appointing them is judge; and they must render to such court, on oath, a just and true account, in writing, of their proceedings and accounts, which is filed with the clerk: the trustees may, before each divi-

dend made, retain for their services, the sum of five per cent. on the whole sum which comes into their hands, over and above all necessary disbursements.

If a person be sued for any thing done in pursuance of this act, he may plead the general issue and give the special matter in evidence. This act is beneficially construed for the creditors in all courts of record.

Every person imprisoned in the state-prison, other than persons adjudged to imprisonment for life, for offences committed after the twenty-ninth day of *March*, in the year one thousand seven hundred and ninety-nine, is deemed to be an absconding debtor, and trustees may immediately, on the application of a creditor, be appointed, without any proof of concealment, warrant or notice, or without any regard to the amount of the sum in which the person may be indebted. The trustees may apply such sum, out of any surplus which may be remaining in their hands, after paying all the debts of the prisoner, which come to their knowledge, for the maintenance of the wife and children, and educating the children of such person, as the chancellor, or a judge of the supreme court, or of any court of common pleas, or mayor or recorder of any city, shall from time to time allow.

Whenever a person against whom such proceedings are had, is lawfully liberated from prison, the said trustees are required to deliver up to him all his estate real and personal which may then remain in their hands, after retaining a sufficient sum to satisfy the lawful charges and expenses which they may have incurred in the execution of their trust.

Where a person so proceeded against hath been or may be imprisoned for life, for an offence committed previous to the twenty-ninth day of *March* 1799, the trustees are required, after the payment of all debts due by him, and retaining a sufficient sum to satisfy all lawful charges and expenses, to deliver the residue of the estate real and personal to such person or persons as may be legally entitled to it.

The recorder of the city of *New-York* is *ex officio* a commissioner, equally authorized and required with a judge of the su-

preme court, to execute the powers which such judge is authorized to execute by virtue of this act.*

Attachments in North Carolina.

To the Editor of the Law Journal.

Sir,

Having no other knowledge of the *American Law Journal*, than such as is conveyed by the slight notice of it in the *Port Folio* of the 23d *July*, I am not sure that the information, contained within, may be useful to you. However, this will serve to express my desire that the work may succeed, because I am convinced that it will, if judiciously conducted, produce very essential public advantages.

Attachments. Proof of Deeds, &c. Power of Attorney in North Carolina.

ATTACHMENTS are granted in the state of *North Carolina* against the estates of debtors who conceal themselves or abscond, upon oath being made of the amount of the debt and of the cause that requires the attachment. The oath may either be made by the plaintiff himself, or by his attorney, agent, or factor; by whom, also, a bond must be given conditioned for satisfying the costs and damages, in the event of a failure in the suit.

* On an assignment of a bond payable by instalments, with a covenant from the assignor, that "if the obligor should become insolvent, or not be able to pay, &c. and if the assignee, &c. should use all due diligence and take all legal measures, &c. immediately after the several sums shall respectively become due," the assignor is liable for the whole amount on the insolvency of the obligor on the first instalment becoming due, and the assignee is not obliged to wait till the last is payable. If the first instalment be not demanded, it will, unless the contrary be shown by the defendant, be presumed to have been paid. An assignment of property under the absconding debtor's act is evidence of insolvency in the debtor; and the assignee of his bond is not precluded from his action against the assignor because he has not proved the amount under the debtor's estate. 1 *N. Y. T. R.* 427.

But no attachment can issue where both creditor and debtor are inhabitants of another state, unless process in an action has been served on the debtor in the state; in which case a judicial attachment may issue. A creditor living in *North Carolina* may attach property there, though the debtor resides in another state. In every case, therefore, where a person having property in that state, but residing in another, is also indebted to an inhabitant of another state, by note or bond, it is expedient for the creditor to assign the debt to a resident of *North Carolina*, to enable him to comply with the preliminary forms.

Where inhabitants of other states devise or convey property, situated in *North Carolina*, and the original deed or will cannot be obtained to register in the county where the land lies, or to adduce in evidence upon a legal controversy, a copy of the deed or will, (after the same has been proved and registered or described agreeably to the laws of the state where the person died or made the same,) being properly certified either according to the act of congress, passed in *May*, 1790, or by the proper officer of the state, and the testimonial of the governor, that the person certifying is authorized so to do—in such cases a copy is equally authentic with an office copy of the state.

Powers of attorney executed by persons out of the state, authorizing the sale of lands in *North Carolina*, must be proved or acknowledged before the chief justice or any judge of the supreme court of the state where the person making it resides, or in a county court thereof, and duly certified by the clerk, or by a notary public. It is then to be exhibited to one of the judges of the supreme court of *North Carolina*, or to the court of the county where the land lies, by whose order it may be registered.

Feme coverts, residing without the state, may jointly with their husbands make powers of attorney, to authorize the sale of lands in which they have an interest in *North Carolina*. But a commission must issue from a judge, or the court of the county where the land lies, to two commissioners to ascertain that the feme hath executed the power voluntarily.

A Brief Historical Examination of the Civil Jurisdiction of Courts of Admiralty.

[The following essay is extracted from the preface to a translation of *Clerke's Praxis*, which has recently been completed by the editor of this journal.]

THE jurisdiction of the civil or instance court of admiralty, as it is at present understood, appears to be of a strangely anomalous kind. Mariners' wages, except where the contract is under seal or is made in an unusual manner; bottomry, in certain cases only and under many restrictions; and salvage, when the property shipwrecked is not cast ashore; appear to be the only subjects within what is now considered to be its legitimate cognizance.

By the publication of Dr. *Robinson's Reports*, we have been, however, for the first time informed, for in the common law books there is no trace of it to be found, that the court of admiralty of *England* entertains suits for the *mere possession* of vessels though it never interferes where the *title* is in controversy. We ought also to have mentioned that the admiralty has an ancient and long recognized jurisdiction, to decide between part owners of ships or vessels, who differ among themselves about the policy or advantage of sending her on a particular voyage.

On considering the present state of the civil jurisdiction of the court of admiralty and tracing back its history to ancient times, we were induced to believe that those different subjects of which it now has the acknowleged cognizance, were the venerable remains of a much more extensive jurisdiction which it once possessed and which it was long permitted to exercise, notwithstanding the restrictive statutes of 13 and 15 *Rich.* II. This opinion was confirmed by a perusal of the present work.

As the court of admiralty is constituted at present the greatest part of its proceedings in civil cases are *in rem*. Indeed it was not long ago held that it had no jurisdiction *in perso-*

nam, and that question was agitated so late as the year 1781 in the great case of *Le Caux* v. *Eden*. If then, in the reign of *Elizabeth* when our author wrote, the jurisdiction of the court of admiralty had been limited as it is at present, his rules of practice would have been particularly directed to the special cases of which it had cognizance, and particularly to proceedings *in rem*. Whereas the modern subjects of admiralty jurisdiction, bottomry, salvage and mariners' wages, are not even mentioned, and only a single chapter or title (the 41st) relates to those proceedings which may properly be said to be *in rem:* for we cannot call by that name an attachment of property for the mere purpose of compelling the appearance of the defendant, on which the plaintiff does not claim any right of ownership or lien, as is the case in a suit on a bottomry bond or for seamen's wages. But it seems from the context of Mr. *Clerke's* book, that the admiralty, in his time, had cognizance of a great variety of matters and contracts which required the same modes of proceeding which are used by courts of general jurisdiction. Indeed it evidently appears that the greatest number of suits which the admiralty then entertained, were actions of debt founded upon contract, which were enforced in the first instance by the arrest of the debtor, if he was present, and by attachment of his property, in order to compel his appearance if he was absent. They entertained petitory suits, in which they decided on the title to property; as well as possessory suits, for the mere possession. No traces whatever appear of such a limited jurisdiction as the admiralty possesses at the present day. And it is remarkable that during the long reign of Queen *Elizabeth*, (forty-four years) no prohibition appears to have been issued against the admiralty court, except two or three which are mentioned by Lord *Coke* in 4th *Inst.* but which we do not find elsewhere reported, and which, if his report be correct, were in violation of the agreement which will hereafter be mentioned. The admiralty jurisdiction then, as far as we are now able to trace it, extended to all cases of freight, charter parties, bottomry, mariner's wages, debts due to material men for the building and repairing of ships, and generally, to what was then

considered as *maritime contracts*. It extended also to contracts made abroad, because those were to be decided according to the civil law, which was and is still the law of the admiralty. This jurisdiction was secured to that court by an agreement which was signed, in the 17th year of *Elizabeth*, by all the common law judges, in order to put an end to the disputes which their jealousy had excited and perpetually kept alive. *Vid.* 4 *Inst.* 136.

But those articles, in the subsequent reigns, were not executed with good faith, any more than similar ones which were as solemnly agreed to in the eighth year of *Charles* I. *Vid. Ray.* 3. *Sea Laws* 235. The judges evaded them by subterfuges which were unworthy of the dignity of the bench, and did not observe them longer than they were constrained by the weight of royal authority. So useful, however, were they considered to be to trade and commerce, that the republican parliament enacted them in substance by an ordinance of the 12th of *April* 1648. *Scobell* 147. But at the restoration, that ordinance ceased to be in force; and the common law judges began again to annoy the admiralty court with prohibitions, as they had formerly done. They did not, however, venture to deprive them of all their jurisdiction; they left the cognizance of those cases of bottomry and mariners' wages which they entertain at present, but declared that they allowed it from mere indulgence and from the necessity of the thing. The admiralty had however been permitted, but for the same reasons, to hold plea of mariners' wages, so early as the 8th of *James* I. *Winch.* 8. anonymous.

It is certain that the court of admiralty, in its origin, had and entertained a jurisdiction coextensive with that of the maritime courts throughout Europe. Those courts were established for the protection of maritime commerce, to which the feudal judicatures of those times were entirely inadequate. We find them in the middle ages established in all the maritime counties of christendom; in some under the name of admiralty, in others under that of consular courts. In the south of *Europe* the judges who had cognizance of commercial and mari-

time causes, were denominated consuls; and the celebrated code by which they were directed was thence called the consulate of the sea. *(Il consolato del mare.)* Those consuls were mere civil judges, unconnected with the military or feudal system; but in the north, where feudality most flourished, and where the judiciary power was considered as a necessary appendage to military grandeur, the constable, who was at the head of the land armies, and the admiral who commanded the naval forces, could not, consistently with the dignity of their stations, be without a portion of the judicial authority; while every petty baron had a court of his own. The constable therefore invested his lieutenants as the barons did their stewards, with the power of deciding on all matters and differences which arose out of the wars; and the jurisdiction over maritime affairs naturally fell to the share of the admiral. His court was established on the model of the consular courts; and those maritime contracts which are regulated by the *consolato del mare* and the laws of *Oleron*, were the subject matters of their civil jurisdiction.

Of this fact there is sufficient evidence to be found in the ancient records that are preserved in *England* in the *Black Book* of the admiralty. Among these, is an ancient statute of king *Edward* I. by which he ordained with the consent of his barons, "that the stewards of their courts should not hold plea of any thing concerning *merchants* or *mariners*, whether it be on *charter-parties* of *vessels*, obligations or other *deeds*, even though it should be under forty shillings. Otherwise they should be proceeded against by indictment; and if found guilty by a jury of twelve, they should be imprisoned at the discretion of the lord high admiral."*

In the reign of *Edward* III. was made the celebrated inquisition of *Queensborough*, which is to be found in *Zouch's Jurisd. of Adm. Ass. p.* 34. It contains a list of offences which the court of admiralty had then from time immemorial been authorized to inquire of and punish; and among those is that "of judges entertaining pleas of causes belonging to the admiral,

* See the text of this statute in Master *Rowghton's* articles, printed with the original of this book. p. 152, 3. 4.

and of such as in admiralty causes, sue in the courts of common law." *Zouch* 36.

This was not, we presume, directed against the king's courts, over whom we do not think that the lord high admiral ever claimed any jurisdiction or control; but against the multitude of inferior courts with which *England* was filled at that period. The court of admiralty, indeed, claimed to be and was then considered as one of the king's superior courts, and as such exercised the power of checking and controlling inferior jurisdictions, and particularly the baron's courts, which at that time ruled almost omnipotent within their respective precincts.

The sturdy barons could not submit to be checked in the midst of a judicial career, which to them was so profitable. For it must not be imagined that they were very ambitious of the honour of administering justice to their inferiors; and that for that alone they would have been anxious to obtain or preserve a share of the judicial authority. But a war of confiscations was then waged by the lords against their vassals. To secure forfeitures, waifs, strays, heriots, deodands, and a variety of other feudal perquisites, was the real reason which induced them to keep that power in their hands. The obsequious stewards, appointed by and removable at the will of the lords, seldom failed to decide similar causes in favour of their imperious masters. Among their perquisites, not the least important to them, were those of *wrecks;* and they seldom failed to appropriate to themselves the vessels and goods which were unfortunately cast upon the *English* coast. As *wreck* was within the proper maritime jurisdiction of the lord high admiral, he interfered with them, not with a view of rescuing the shipwrecked property for the benefit of the owners, but in order to obtain it himself as a *droit* of his office. At that time several of the maritime towns enjoyed *franchises* of their own, and were exempted from the jurisdiction of feudal lords and their stewards. There the municipal authority, whose manners were softened and refined by the plastic influence of commerce and the fine arts, preserved such shipwrecked property as came within their bounds, and restored

it to the owner. To them the exercise of that and other parts of the admiral's jurisdiction became intolerable; and in the reign of *Richard* II. they laid their complaints before parliament.* The barons, as may be supposed, lent them a ready ear, and their remonstrances speedily procured the famous statutes of 13 *Richard* II. *cap.* 5. *and* 15 *Richard* II. *cap.* 3. by which *wreck* was, among other things, expressly excluded from the jurisdiction of the court of admiralty.

By the first of those statutes it was enacted that the admiralty should only meddle with things *done upon the sea*, as had been used in the reign of *Edward* III. and by the second that he should not have cognizance of *contracts*, *pleas and quarrels*, *and other things rising within the bodies of counties*, *nor of wreck*. It seems, however, that notwithstanding these statutes the court of admiralty continued to exercise its ancient jurisdiction with but little interruption from the courts of common law, until the reign of *James* I.; that even in that reign and while Lord *Coke* sat on the bench, prohibitions were not frequent; that in the reign of *Charles* I. the agreement which had been made under *Elizabeth* between the courts of admiralty and common law, for the settlement of their respective jurisdictions was renewed; and it was not until the reign of *Charles* II. that a serious struggle took place between the two authorities; which finally terminated in favour of the common law.

The contest was dexterously managed on the part of the civilians by *Exton*, *Zouch* and *Godolphin*, who were able and eminent jurists. In the support of the doctrines which they maintained they displayed all the ingenuity and force of reason; but although the weight of argument was manifestly and decidedly on their side, yet the superior power and influence of the king's courts of common law prevailed.

But the works of these civilians may be consulted with great advantage by those who are desirous of becoming intimately acquainted with the nature and extent of the ancient jurisdiction of the *English* court of admiralty, and the usurpations, for so they must now be called, of the courts of common law.

* 3 *Reeves Eng. Law* 197.

They interpreted the statutes of *Richard* in such a manner as not to leave the court of admiralty *any civil jurisdiction* whatever. This was an interpretation which could not have been the intention of the framers of the law, who undoubtedly meant to leave them, except as to *wreck*, the same jurisdiction which they had exercised in the reign of *Edward* III. And we have seen above what that was. But the courts of common law determined that if a contract was made at sea, but to be executed on land, or made on land to be executed at sea, in either case, the common law had jurisdiction exclusive of the admiralty. What contracts then were those which remained within the jurisdiction of the latter court? Who can conceive an idea of a contract *made at sea to be performed at sea?* an instrument, for instance, made in one latitude to be executed in another? The civilians more rationally interpreted the statutes to mean, by *things and contracts done at sea*, those things and contracts, which, although the instrument by which they were evidenced may be made on land, yet are of a maritime nature, and are usually *performed at sea:* such as contracts of affreightment and the like; of the cognizance of which the admiralty was clearly possessed in the reign of *Edward* III.

The question, however, is now at rest in *England;* and the high court of admiralty has submitted to the restrictions which the courts of common law have imposed upon its jurisdiction. Yet in later times, those courts have appeared to regret that those encroachments had been carried so far; and the decisions, since the time of Lord *Mansfield*, breathe a spirit of much greater moderation than those of his predecessors. On several points, where it was doubtful, the admiralty jurisdiction has been secured and fortified by clear and explicit adjudications; in other cases, it has been evidently enlarged: as in that of suits on bottomry contracts *under seal. Menetone* v. *Gibbons*, 3 *Term Rep.* 267. There it was determined that the jurisdiction of the court of admiralty does not depend on the *locality* of the contract but on the *subject matter*. This is the very principle for which the civilians have so long contended; and it only now remains to apply it with proper liberality in

order to restore to the courts of admiralty that jurisdiction of which they have been deprived by the jealousy of the courts of common law.

We would not have entered so fully into this subject, but that we think there arises out of it an important question under the constitution of the *United States*. By that instrument, the *United States* are invested with the judiciary powers in all cases of *admiralty and maritime jurisdiction*. Is that jurisdiction the same which the high court of admiralty of *England* formerly possessed? or is it restricted by the statutes of *Richard* II. and the adjudications of the *English* courts founded upon them?

We are decidedly in favour of the former principle; because we think that a more extensive admiralty jurisdiction in the *United States* would be highly advantageous to maritime commerce, by promoting uniformity of decision and a greater dispatch of business, in that important branch of our civil concerns. We content ourselves, however, with barely suggesting this interesting question, which we leave to be investigated and determined by those who are the proper judges, and who are eminently better qualified for the task than we can pretend to be.

Limitation of Actions in Maryland.

BY the act of 1715, *ap. ch.* 23. it is provided that all actions of trespass *quare clausum fregit*, of trespass, detinue, surtrover or replevin for taking away goods or chattels, of account, contract, debt, book, or upon the case, other than such as concern the trade or merchandise between merchant and merchant, their factors and servants who are not residents within the state; all actions of debt for lending, or contract without specialty, and of debt for arrearages of rent, must be sued within three years ensuing the cause of such action; and those on the case, for words, or of trespass of assault, battery, wounding and imprisonment, within one year.

But if, at the time when the action accrues, the party be under twenty one, *feme-covert*, *non compos mentis*, imprisoned

or beyond seas, the term of limitation does not commence until the impediment is removed. No person absenting himself out of the state or removing from county to county, after any debt has been contracted, whereby the creditors may be at an uncertainty in finding him out, or his effects, can claim any benefit of this act.

But the act cannot be construed to the prejudice of a person who removes from one county to another, or from the state, for the term limited in the act, provided he leaves effects sufficient and known for the payment of his just debts in the hands of some person who will assume the payment thereof.

By the act of *November* 1765, *ch.* 12. persons liable to any action, who may be absent at the time when the cause thereof accrues, have no benefit of limitations, provided, that after their presence such action be commenced within the time limited.

The act of 1715 further provides that no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty, whatsoever except such as are taken in the name or for the use of the king, shall be good and pleadable or admitted in evidence against any person of this state, after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing; saving to persons under the above mentioned disabilities, the full benefit of bringing actions within five years after such disability has been removed.

No sheriff or subsheriff can take any writing obligatory without indorsing the consideration upon which it was passed; but to prevent them from receiving any damage from the act of limitations, the time during which they remain in office is not reckoned.

Actions on sheriffs' bonds must be brought within five years from their date, saving to infants &c. five years, and to the state the right of suing at any time. Those upon administration and testamentary bonds within twelve years, saving to infants &c. six years. No assignment, assurance, conveyance, deed or any other writing whatsoever executed by a person trading to this

state and residing out of it at the time of the execution, can be given in evidence after the debt or thing in action is above three years' standing, saving to infants, &c. three years.*

Where a cause has been referred to arbitration, by virtue of the act of *October* 1778, *ch.* 21., and either of the parties or arbitrators dies before the award is made, or either of the latter have refused to serve, or if the award is set aside, then the time from the impetration of the original writ to the death of the party, refusal to serve, or setting aside of the award, is not reckoned as part of the time limited.

No prosecution or suit can be commenced for any penalty or forfeiture, imposed by the act for the regulation of officers' fees, after one year from the time of the offence.

Where no suit is brought to call in question the adjudication of the commissioners for marking and bounding lands within five years after the return has been recorded, the making and bounding and the record of it, is conclusive evidence of the original location, both as to the direction and termination of the lines; saving to infants &c. five years &c.

Where a claim has been exhibited against the estate of a deceased person, and rejected by the administrator or executor, the creditor must commence his suit within nine months from the time of such rejection or be for ever barred.

* Vid. ante p. 330.

Circuit Court of the United States.

SOUTH CAROLINA DISTRICT, 28th MAY, 1808.

Ex parte Adam Gilchrist and Others *v.* The Collector of the Port of Charleston.

Before JOHNSON and BEE, Judges.

MANDAMUS. INSTRUCTIONS FROM THE SECRETARY OF THE TREASURY. COLLECTORS. The circuit court has power to issue a mandamus to a collector, commanding him to grant a clearance. All instructions from the executive which are not supported by law are illegal and no inferior officer is bound to obey them.

EMBARGO.

A MOTION was made by Mr. *Ward* for rule on the collector to show cause why a mandamus should not be issued against him, to compel the granting of clearances for the ship *Resource*, *Moreton;* ship *Two Pollies*, *Wilder;* ship *Navigator*, *Bowden;* ship *Rising States*, *Anderson;* and ship *Louisa Cecilia*, *Fowler*, founded on the following affidavit:

" *Adam Gilchrist* and *J. S. Barker*, of *Charleston*, merchants, being severally sworn according to law, depose, that the *American* register ship *Resource*, arrived from a foreign voyage in the port of *Charleston* about six months since, owned one half by the deponent, *J. S. Barker*, residing in *Charleston*, and the other half by *American* citizens residing in *Baltimore;* that the deponent representing the owners aforesaid, apprehensive that the bottom of the ship might, by her being detained here during the embargo, be totally destroyed by worms, did for that reason determine on sending her to *Baltimore* and regularly advertised for freight to said port of *Baltimore;* that having obtained the promise and actually engaged the freight

of about six hundred bales of cotton, it became requisite to ship either ballast or heavy freight, so as to enable the said ship to be navigated with safety; the ballast not being obtainable, these deponents, about three weeks since, agreed to carry to *Baltimore* about two hundred barrels of rice, freight free; and that the same was shipped by permit from the custom house and under the inspection of a revenue officer about two weeks since; that on application for a clearance of the said ship and her cargo to *Simeon Theus*, collector of the port of *Charleston*, duly commissioned and authorized to exercise and perform the duties of said public officer of collector of the port aforesaid, he hath refused to grant a clearance to said vessel and cargo, alleging that although he hath no suspicion that the clearance demanded is to cover an ostensible voyage to *Baltimore*, or to infringe or evade the existing laws relative to the embargo, and although he admits that the said ship was laden previously to his receipt of the act of congress, respecting the embargo, under date of the 25th *April*, ult. yet that he is bound to refuse such clearance under the directions of the executive of the *United States*, which he conceives he is bound to obey; that these deponents have just right under the law to obtain from said *Simeon Theus*, collector as aforesaid, the clearance so withheld and refused to be granted.

ADAM GILCHRIST.
J. SANFORD BARKER.

Sworn before me this 24th of *May* 1808.

JOHN WARD, Q. U.

Upon the return of the rule the defendant showed the following cause:

United States, South Carolina District. Federal Circuit Court.

Ex parte *v.* Simeon Theus, Esq. Collector of the Port of Charleston.

RULE to show cause why a mandamus should not issue, requiring him to grant clearances of certain vessels.

Simeon Theus, collector of the port aforesaid, on whom a copy of the above rule has been served for cause, showeth:

"That in and by a certain act of congress of the said *United States*, passed the 25th day of *April* 1808, it is, in the 11th sect. thereof, amongst other things, enacted: 'that the collectors of the customs be, and they are hereby respectively authorized, to detain any vessel *ostensibly* bound with a cargo to some other port of the *United States*, whenever, *in their opinion*, the intention is to violate or evade any provisions of the acts laying an embargo, until the decision of the president of the *United States* be had thereupon.' Also, that in and by a certain circular letter from the treasury department of the *United States*, dated the 6th of *May* 1808, and addressed to the said *Simeon Theus*, as collector aforesaid, he is instructed as follows: [Here follows the circular instructions of Mr. *Gallatin*.] That the said *Simeon Theus*, collector as aforesaid doth not detain the vessels as aforesaid, under the act aforesaid, because in his opinion there is no intention in the parties aforesaid to violate or evade any of the provisions of the acts laying an embargo, but that he detains them under the instructions he has received in the letter aforesaid, and which as a public officer he thinks he is bound to obey. That being unwilling, on the one hand, to injure individuals, and, on the other, equally so, to commit a breach of his duty, he submits the question to the court, upon the cause above shown.

SIMEON THEUS, *Collector*."

The case was then submitted without argument.

JOHNSON J. "The affidavit, upon which this motion is founded, states, that the ship *Resource* is ballasted with 140 barrels of rice, under a load of cotton, and is destined for the port of *Baltimore*. The collector, in his return to the rule, acknowledges, that he believes the port of *Baltimore* to be her real destination; and that, if he had no other rule of conduct but the 11th section of the act supplementary to the embargo act, he would not detain her; but urges in excuse, for refusing her a clearance, a letter from the secretary of the treasury. It is not denied that if the petitioners be legally entitled to a clearance, this court may interpose its authority, by the writ of

mandamus, to compel the collector to grant it. The only questions, therefore, will be, whether the section of the act alluded to, authorizes the detention of the vessel; and if it does not, whether the instructions of the president, through the secretary of the treasury, unsupported by act of the congress, will justify the collector in that detention. On the latter question there can be no doubt. The officers of our government, from the highest to the lowest, are equally subjected to legal restraint; and it is confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty. In the letter alluded to, Mr. *Gallatin* speaks only in the language of recommendation, not of command; at the utmost the collector could only plead the influence of advice, and not the authority of the treasury department in his justification.

" In the act of congress there is no ambiguity. The object is to prevent evasions of the embargo act, by vessels which sail ostensibly for some port in the *United States*, when their real destination is to some other port or place. The granting of clearances is left absolutely to the discretion of the collector; the right of detaining in cases which excite suspicion is given him, with a reference to the will of the executive. Congress might have vested this discretion in the president, the secretary of the treasury, or any other officer, in which they thought proper to vest it; but, having vested the right of granting or refusing in the collector, with an appeal to the president only in case of refusal—the right of granting clearances remains in him unimpaired and unrestricted.

" It does not appear to us that the instructions from the treasury department are intended to reach this case. The recommendation not to grant clearances on shipments of provisions appears by the context to be restricted by two provisoes, evidently pointed at by the reasons assigned for that recommendation. First, if intended for a place where they are not wanted for consumption, or we suppose, where supplies of the same article can be had from the state or neigh-

bourhood in which such place is situated. Secondly, for a port that usually exports that article. Now with regard to the article of rice, it is impossible to say how much the city of *Baltimore* will want for its consumption, as they have no internal supplies, and as the three southern states alone are exporters of that article. Shipments of rice from *Baltimore* to *Charleston* might create suspicion, but not such shipments from *Charleston* to *Baltimore*. We are of opinion that the act of congress does not authorize the detention of this vessel. That without the sanction of law, the collector is not justified by the instructions of the executive, in increasing restraints upon commerce, even if this case had been contemplated by the letter alluded to; but that from a temperate consideration of that letter, this case does not appear to come within the spirit and meaning of the instructions which it contains."

A mandamus was ordered accordingly, commanding the collector to grant a clearance to the *Resource*.

Letter from the attorney-general to the president of the *United States*, relative to the proceedings of the circuit court of *South Carolina* in the case of the *Resource*.

SIR,

I HAVE read and considered the papers and documents referred to me relative to the case of a mandamus, issued by the circuit court of the *United States* for the district of *South Carolina*, to compel the collector of the port of *Charleston* to grant clearances to certain vessels.

The first question that naturally presents itself, is, whether the court possessed the power of issuing a mandamus in such a case.

A mandamus in *England* is styled a prerogative writ, and in that country is awarded solely and exclusively by the court of king's bench.

The constitution and laws of the *United States* establish our judicial system. To these we must refer, in order to ascertain the jurisdiction of the respective courts, the extent of their powers, and the limits of their authority.

The "act to establish the judicial courts of the *United States*," passed the 24th *September* 1789, declares and defines the jurisdiction of the several courts thereby created, and among these the jurisdiction of the circuit courts. Upon a careful and attentive perusal, it will be found to delegate to the circuit courts no power to issue writs of mandamus. In the thirteenth section of that act, this authority is expressly given to the supreme court of the *United States*. In like manner it is specially provided by the act of the 3d *February* 1801, that the supreme court shall have power to issue writs of mandamus. This last act having been repealed and the former revived, the question must rest on the true construction to be given to the original act.

The eleventh section defines and limits the jurisdiction of the circuit courts. It is specially appropriated to this single object. There are no expressions in this section which can fairly be interpreted to confer the authority of issuing writs of mandamus; nor can the power be either implied or inferred from any language it contains. It is true, the proceeding by mandamus in *England* is on the crown side, as it is termed, of the court of king's bench. But it is a prosecution relative to a civil right to enforce it, and to obtain prompt redress; and not to punish criminally as in the case of an offence. The provision therefore that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the *United States*, *except where the act otherwise provides*," &c. cannot warrant such a proceeding. Besides, the same act does provide that the supreme court shall issue writs of mandamus. An authority given, perhaps, because its jurisdiction extended all over the *United States*.

The fourteenth section, immediately succeeding that which gives this authority, in plain and positive terms, to the supreme court, solely, if not exclusively, (and the affirmative frequently, and in this case justly, I think, implies a negative) contains the following provision. "All the before mentioned courts of the *United States*, (including the supreme as well

as the circuit and district courts) shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions." This clause cannot affect the case, I conceive. The mandamus is a writ which, we have seen, is specially provided for by law. This section was evidently not designed to give any additional jurisdiction to either of the courts, but merely the means of executing that jurisdiction already granted to them respectively. The issuing of a mandamus in the case under consideration was an act of original jurisdiction. Precisely as much so, as it would have been in the supreme court, to have exercised the power in the case of *Marbury* v. *Madison*. In that case the supreme court declared, that to issue a mandamus to the secretary of state, would be, to exercise an original jurisdiction, not given by the constitution; and which could not be granted by congress. The constitution having enumerated or declared the particular cases in which the supreme court should exercise original jurisdiction, though there were no negative expressions, the affirmative, they considered, implied them. It was on this principle alone they refused to exert their authority.

The practice, I believe, has uniformly been, so far as I can trace it from the books of reports that have been published, or from recollection and experience on the subject, to apply to the supreme court for a mandamus. This court it is true have determined not to issue the writ, when it would be an act of original jurisdiction. But this I apprehend, can afford no ground for the circuit court's assuming an authority which the supreme court have declined, unless by a legislative act the power be delegated to them. This power is not inherent nor necessarily incidental to a court of justice, even of general jurisdiction. For in *England* but a single one, of several courts having general jurisdiction, possesses the authority. Neither the chancery, the common pleas, nor the exchequer, though classed among the king's superior courts and having general jurisdiction over the realm, can exercise this power. It is the

peculiar privilege of the king's bench alone. Our circuit courts have merely a local and subordinate jurisdiction. Their analogies therefore with the four courts of *England*, having general and superior jurisdiction, must be very weak, and still weaker their claim to the preeminent distinction of the king's bench, which possesses solely the exclusive authority of issuing the mandamus.

For these reasons I am induced to believe from the best consideration I have been enabled to give the subject, that the circuit court of *South Carolina* had no authority to issue a mandamus to the collector of the port of *Charleston*.

It is scarcely necessary to remark, that when a court has no jurisdiction, even consent will not give it; and much less will the mere tacit acquiescence of a party, in not denying their authority.

Independent of this serious and conclusive objection to the proceeding adopted by the court there are others entitled to consideration. For supposing the court did not err in the exercise of jurisdiction, and admitting the *British* doctrines on the subject without restriction or limitation could be extended to this country, there are legal exceptions to the course they have pursued, supported by *English* authority.

In the first place, the law gave the collector complete discretion over the subject. According to the opinion he might form, he possessed competent authority to grant or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court, agreeably to the *British* practice and precedents, ought not to interpose by way of mandamus.

Secondly. In this case there was a controlling power in the chief magistrate of the *United States*. There was in fact, an express appeal given to the president by the very words of the act of congress, which authorizes the collectors to detain vessels " until the decision of the president of the *United States* be had thereupon." By the mandamus the reference to the president is taken away; and the collector is commanded to clear the vessel without delay. Agreeably to the *English* au-

thorities under such circumstances, it is not the course I believe to issue a mandamus.

Thirdly. The parties, it seems, had their legal remedy against the collector; and it is not usual if not unprecedented, to grant a mandamus in such a case.

Fourthly. A mandamus is not issued to a mere ministerial officer to compel him to his duty. The court will leave the parties to their remedy by action, or even by indictment. In *England*, in a very late case, they decided that they would not grant a mandamus to a ministerial officer, such as the treasurer of a county; for the proper remedy was by indictment.

I am aware of a precedent, in which it seems to be admitted, that a mandamus may issue to the commissioners of excise, to compel them in a proper case to grant a *permit*. This case is more analogous to the one now before us than any other I have been able to discover, after a diligent research. But in this instance the point was not made, nor the question argued. Besides the commissioners of excise in *England* form a board for superintending the collection of that branch of the revenue. They constitute in many respects a court of inferior jurisdiction, which in particular cases takes cognizance in a summary way, of offences against the excise laws. A mandamus might be granted to such a tribunal when it would not be issued to a mere ministerial officer, acting under them in the collection of the revenue.

It results from this view of the subject, that the mandamus, issued by the circuit court for the district of *South Carolina*, was not warranted by any power vested in the circuit courts by statute, nor by any power necessarily incident to courts, nor countenanced by any analogy between the circuit courts, and the court of king's bench: the only court in that country possessing the power of issuing such writs. And it further appears, that even the court of king's bench, for the reasons assigned, would not agreeably to their practice and principles, have interfered in the present case by mandamus.

It might perhaps with propriety be added, that there does not appear in the constitution of the *United States* any thing which

favours an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments should dictate great circumspection to each, in the exercise of powers having any relation to the other.

The courts are indubitably the source of legal redress for wrongs committed by ministerial officers; none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and obvious distinction, between a course of proceeding which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the president, and prescribing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other all responsibility is taken away; and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the president to take care that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by mandamus all the executive officers; all subordinate to the president at least, whether charged with legal duties in the treasury or other department, to execute the same according to the opinion of the judiciary and contrary to that of the executive. And it is evident that the confusion arising will be greatly increased by the exercise of such a power by a number of se-

parate courts of local jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary, acting within their respective districts, their courses might be different; and different rules of action might be prescribed for the citizens of the different states, instead of that unity of administration which the constitution meant to secure by placing the executive power for them all, in the same head.

What too becomes of the responsibility of the executive to the court of impeachment, and to the nation? Is he to remain responsible for acts done by command of another department? or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred, that the constitution of the *United States*, by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principles of the *English* law, which would authorize either to enter into the department of the other, to annul the powers of that other, and to assume the direction of its operations to itself.

These remarks are respectfully submitted to your consideration. They are made with due deference to the opinion of the court; with one of the judges constituting which, I am personally acquainted, and for whose character I feel the sincerest regard.

Yours very respectfully,

(Signed) C. A. RODNEY.

The President of the United States.

July 15th 1808.

JUDGE JOHNSON'S REMARKS on the publication of the attorney general's letter to the president, on the subject of the *mandamus* issued by the circuit court of *South Carolina* to the collector, in the case of the *Resource*.

Edgefield District, 26th August, 1808.

In a *Charleston* paper, received by the last mail, I have perused a letter addressed by the attorney general of the *United States* to the president, relative to the proceedings of the circuit court of *South Carolina*, in the case of the *Resource*. That the president should have consulted that officer upon a legal subject, is perfectly consistent with the relation subsisting between their respective stations; and as long as the result of that consultation was confined to the cabinet, there had occurred nothing inconsistent with the relation between the executive and judicial departments. But when that opinion is published to the world, under the sanction of the president, an act so unprecedented in the history of executive conduct could be intended for no other purpose than to secure the public opinion on the side of the executive and in opposition to the judiciary. Under this impression I feel myself compelled, as the presiding judge of the court, whose decision is the subject of the attorney general's animadversions, to attempt a vindication of, or at least an apology for that decision. So long as its merits were the subject of mere newspaper discussion, I felt myself under no concern about the opinion that the public might form of it. The official acts of men in office are proper subjects for newspaper remarks. The opinion that cannot withstand a free and candid investigation must be erroneous. It is true that a judge may, without vanity, entertain a doubt of the competency of some of the *editors of newspapers* to discuss a difficult legal question; yet no editorial or anonymous animadversions, however they may have been characterized by illiberality or ignorance, should ever have induced me to intrude these observations upon the public. But when a bias is attempted to be given to public opinion by the overbearing influence of high office, and the reputation of ability and information, the ground

is changed; and to be silent could only result from being borne down by weight of reasoning or awed by power. I should regret exceedingly should I err in attributing to the president the publication of the attorney general's letter. I do so because, from the nature of the case, it is impossible to think otherwise. There is no reason to suppose that the attorney general would have published it at all; or at least not without the command or permission of the president. That the attorney general should have formed conclusions differing from those of the court, is the most natural thing imaginable. It proceeds from the assumption of erroneous *premises*.

The writ of *mandamus* in a case analogous to that of the *Resource* is not provided for by law.

The collector had not an unlimited discretion in granting or refusing a clearance.

There was not a general appeal to the will of the chief magistrate.

Nor does the court found its right to issue the *mandamus* upon an analogy drawn from the courts of *Great Britain*.

Upon the affirmation of these propositions the opinion of the attorney general appears to be predicated. In addition to which he would seem to have misapprehended the purport of the decision of the supreme court, in the case of *Marbury* v. *The Secretary of the state*, and to have drawn reasons from inconvenience, which may prove a great deal too much for the public security; and which have already met with the disapprobation of the supreme court in the before mentioned case. A concise history of the case of the *Resource* is indispensably necessary in pursuing the subject.

In order to prevent evasions of the laws prohibiting foreign intercourse, congress found it necessary to grant certain powers to the collectors, by which they might detain vessels, clearing out for a port of the United States, when their real destination was to some foreign port or place. For this purpose was passed the following clause of the act of *April* 25th, of the present year.

Sec. 11. " And be it further enacted, That the collectors of the customs be and they are hereby respectively authorized to detain any vessel *ostensibly* bound with a cargo to some other port of the *United States*, whenever in their opinions, the intention is to violate and evade any of the provisions of the acts laying an embargo, until the decision of the president of the *United States* be had thereon."

This clause, although from a superficial view it may seem otherwise, really authorizes no restraint whatever upon the commercial intercourse of the several states, or of any state within itself. It is not a vessel really bound from one port or place in the *United States* to another, that the collector is authorized to detain, for that is no violation of the embargo act; but those which are only *ostensibly* bound from one port to another, within the *United States* when *their real destination* is to some other port or place, or to do some act in violation of the laws imposing an embargo. I assume it as an incontestable proposition, that every inhabitant of the *United States* has a perfect right to carry on commerce from one port to another, unless restricted by law; that no officer of our government can legally restrict him in the exercise of that right, except in cases specified by law. I would as soon attempt to prove his right to the air that he breathes, or the food that he consumes, as to support these doctrines by a course of reasoning; nor is it less clear, that in all cases of uninterdicted commerce, the collector is bound to grant a clearance whenever the forms imposed by law have been complied with. It is the obligation on him correlative to the right of the citizen. Upon an attentive and candid perusal of the foregoing clause, (which is the only one upon this subject) it is impossible for the mind to refuse its assent to the following propositions:

1. That it gives no power to the president to order a detention in any case.

2. That it authorizes the collectors to detain in one specified case, and that only, viz. whenever, in *their opinion, the intention is to violate, and evade any of the acts laying an embargo.*

3. That the only case, in which the law authorizes the president to act upon the subject, is, when the collector having detained a vessel, a reference is made to the president for his decision on the correctness of the grounds of such detention.

4. That the discretion in granting clearances is absolute in the collector, in the first instance; and only results to the president in case of the collector's refusal. From which it will follow that the president could not prescribe to him a line of conduct in granting clearances which was inconsistent with his own judgment; and, in fact, it will be found that the only effect in granting the *mandamus* in the case of the *Resource* was to secure to the collector the exercise of the power vested in him by the foregoing section, and to the citizen the benefit of the collector's being released from a restraint which the law did not impose on him.

On the 6th May 1808, the secretary of the treasury addressed to the collector of the port of *Charleston* the following letter:

"SIR, I informed you in my letter of the 28th ultimo, that the president considered unusual shipments, particularly *of flour and other provisions*, of lumber and of naval stores, as sufficient causes for the detention of the vessel. Pot and pearl ashes and flaxseed, ought to have been added to the list; but he has given it in charge to me, to call your attention still more forcibly to that object; as it was the great and leading object of the legislature in giving the power of detention, he considers it his duty, in the execution of it, *to give complete effect to the embargo laws. He recommends therefore that every shipment of the above articles, for a place where they cannot be wanted for consumption, should be detained*," &c. &c.

The *Resource* was one of a number of vessels that were loaded and waiting in the port of *Charleston*, to sail as soon the embargo should be raised; her cargo consisted of rice and cotton. About the month of *June*, it is well known that in that port the worm is peculiarly destructive to vessels' bottoms. This induced the merchants generally, about that time, to

adopt the resolution to despatch their vessels to some northern port, where they might escape the ravages of this destructive insect. Upon the collector's refusing to grant a clearance to any vessel, the cargo of which consisted in any part, however small, of provisions (pursuing the strict letter of his instructions) application was made to the court for a mandamus, on an affidavit stating the above facts; and a rule was granted without opposition. Upon the return of the rule the collector expressly declared *that, in his opinion, the Resource had no intention to violate or evade any of the provisions of the acts laying an embargo*, but urged the secretary of the treasury's letter to him, as the sole ground of his refusal to grant a clearance. It is easy to perceive the embarrassment into which this officer was thrown. On the one hand, he must have been sensible of the impropriety of detaining a vessel on pretence of a suspicion which he did not and could not entertain; that the wanton and injurious exercise of even a legal discretion would subject him to damages; and that the amount, to which he must render himself liable in this case, was infinitely beyond any thing he was able to pay; as the merchants threatened to throw their vessels upon his hands. He may also have felt that sentiment of injury which affects the mind of every one upon the undue restriction of the exercise of his own faculties. But on the other hand, as he held his office absolutely at the will of the executive, acquiescence was necessary; although ruin threatened him, and no prospects of indemnity could possibly present themselves. In this situation he made his statement of the foregoing circumstances, and submitted the case to the court, through the district attorney, without argument. Upon the return of the rule, the court particularly called upon the *United States'* attorney, to say if he contested the power of the court to proceed by way of mandamus in the case before them. He replied that he could make no objection. The high respect in which that gentleman's talents and information are held would be at least an apology for any court's proceeding in that mode, upon his acquiescence. Under these circumstances, when every point was conceded, except whether the instructions of the president

could authorize a detention in a case not comprised within the law of congress, the court did not, could not hesitate to decide that, to detain a vessel, because, in his opinion, her intention was to evade the embargo laws, when he avowed his opinion to be otherwise, was an absurdity in terms; that if the act of congress did not authorize the detention of the vessel, the instructions of the president could not sanction it; and as the remedy by an action for damages was very inadequate to the full vindication of the rights of the petitioner, a mandamus should issue. The court went further, and observed that the instructions, upon which the collector relied, did not appear to have been intended to reach the case before them; and if they did, they were only in the language of recommendation and not of command; so as to leave the collector still at liberty to exercise that discretion which the law had given him. But in these latter remarks, there is every reason to think that they misapprehended the intention of the executive; as the publication of Mr. *Rodney's* letter may be viewed as a full avowal that the case of the *Resource* was contemplated by the executive; and that a recommendation was expected to operate upon the dependent situation of the collector with the weight of a command. From which it would result, that every power, given to an officer removable at the will of the executive, is given to the executive.

In pursuing my remarks on the attorney general's letter, I feel an embarrassment, resulting from what I hope he will excuse me for denominating a want of precision of language. Jurisdiction in a case is one thing: the mode of exercising that jurisdiction is quite another. That the court possessed jurisdiction over the case between the parties before them, is admitted by the attorney general, when he supposes that the owner of the *Resource* may have maintained his action against the collector for an illegal detention. The language of his tenth paragraph supposes a total and absolute defect of jurisdiction; while that of some of the paragraphs preceding it seems to imply that the impropriety lay in the mode of process by which the court exercised that jurisdiction. To avoid, how-

ever, all ambiguity and the charge of misapprehension or misstatement of the argument, I will direct my observations to three points, which must embrace the whole subject:

1. The jurisdiction of the circuit court.

2. The power of that court to issue the mandamus, in the exercise of that jurisdiction.

3. The propriety of issuing it in the case of the *Resource*.

The jurisdiction of the court, as is properly observed by the attorney general, must depend upon the constitution and laws of the *United States*. We disclaim all pretensions to any other origin of our jurisdiction, especially the unpopular grounds of *prerogative* and *analogy to the king's bench. That judicial power*, which the constitution vests in the *United States*, and the *United States* in its courts, is all that its courts pretend to exercise. In the constitution it is laid down, that " the judicial power of the *United States* shall extend to all cases in law or equity, arising under this constitution and laws of the *United States*, and treaties made, or which shall be made," &c.

The terms *judicial power* convey the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term *power* could with no propriety be applied, nor could the judiciary be denominated a department of *government*, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution. But to what purpose establish a judiciary, with power to take cognizance of certain questions of right, but not power to afford such redress as the case evidently requires? Suppose congress had vested in the circuit court a certain jurisdiction, without prescribing by what forms that jurisdiction should be exercised; would it not follow that the court must itself adopt a

mode of proceeding adapted to the exigency of each case? It must do so, or refuse to act. One thing, at least, cannot be denied: that the power of congress was competent to authorize the circuit court to issue the writ of mandamus. From this it would follow, that issuing that writ is a mere incident to the judicial power, and not in itself a distinct branch of jurisdiction; for the constitution no where expressly vests in the *United States* the power to issue that writ, or any other. And if a mere incident, I see no reason why it should not follow with the principal jurisdiction, when vested by congress in its courts. If it were necessary to appeal to analogy, to justify any exercise of jurisdiction, it would be easy to show that the supreme court of the *United States* bears a stronger analogy to the court of exchequer, or that of parliament, than the court of king's bench; and that if there exist any analogy between any of the courts of the *United States* and those of *Great Britain*, it is between the court of king's bench and the latter, and the circuit court of the former government; the union of criminal and civil, and of original and appellate jurisdiction, marks the similarity of the latter. But it is wholly unnecessary to recur to any other authority than what is given us by the constitution and laws of the *United States*, as the constitution defines in what cases, and between what description of persons our courts may exercise jurisdiction; and the form or mode of process is sufficiently settled by acts of congress. That description of cases, under which the present must be arranged, is, *cases arising under the laws of the United States*. If it be a question of right arising under the laws of the *United States*, it is one of those to which the judicial power of the *United States* extends, and for which they were bound to administer a remedy; not one that would mock the hopes and just expectations of the individual, but an adequate and efficient remedy. I deem it unnecessary to enter into a critical examina- of the acts of congress on the question, whether jurisdiction in cases arising under the laws of the *United States* is delegated to the circuit courts. The inveterate exercise of that jurisdic-

tion under the sanction of the supreme court is the authority, I appeal to.

2. In considering the power of the court to issue the writ of mandamus in the exercise of its jurisdiction, the attorney general cannot demand greater fairness than to be met on his own principles. His argument is, that the power given to the circuit court relative to the issuing of writs (except as to two particularly named) extends only to writs not specially provided for by law. That the power to issue the writ of mandamus is by law vested in the supreme court, and therefore is provided for by law. Here nothing but my frequent experience of that gentleman's habitual candour, prevents me from charging him with unfairness; or perhaps he really misapprehended the purport of the decision of the supreme court in the case of *Marbury* v. *The secretary of state;* as upon no other suppositions could he have used this argument. In that case the court did not decide, as the attorney general seems to suppose, that issuing a mandamus was an exercise of jurisdiction not within the scope of the judicial powers of the *United States.* On the contrary, they expressly declare the power and the propriety of the courts issuing it in many cases which may occur. But except in cases where a foreign minister or a state is a party, the supreme court is restricted to the exercise of an *appellate* jurisdiction; and its decision was, that the act of congress, so far as it was intended to vest that court with power to issue the writ of mandamus in a case partaking of the nature of *original jurisdiction*, was unconstitutional and void. A void law I presume is no law; and it would follow therefore that the writ of mandamus, in those cases of original jurisdiction, which cannot constitutionally be submitted to the supreme court, comes fully within the description of a writ not otherwise provided for by law. Certain it is that if the circuit court of this state could not issue this writ in the case of the *Resource*, there was no legal provision by which the benefit of it could have been extended to her owner. The supreme court could never have exercised jurisdiction over the question of right between the parties in that case, except upon appeal.

Whatever suit or action was proper on the occasion, was by the constitution confined to the other tribunals in the first instance. But the right of the court to issue this writ does not wholly rest here. There is another act in force (although not to be found in *Graydon's Digest*) which appeared to authorize, nay to oblige us to issue the writ of mandamus. The act of congress, commonly called the process law, enjoins on the courts of the *United States* to conform their practice to that of the several states in which they sit. I am aware that in technical language the term *process* (which is the word used in that law) includes only those acts which take place between the institution and conclusion of an action. But whoever perurses this act, will find on the face of it strong reasons for indulging it with a construction conforming to the vulgar use of the term *process*. In fact it affords incontestable evidence that the legislature understood the term *process*, as embracing the whole scope of judicial proceedings. The title of the act is, " an act to regulate judicial process in the courts of the *United States;*" and the first line of it mentions writs as a proceeding included under this general head. Executions also are objects of the act, as well as proceedings in the equity and admiralty courts. The correct, legal and received construction of this act therefore is, that the forms and modes of administering justice, the remedies to be applied to the rights which are committed to our jurisdiction shall be such as are used and allowed in the supreme courts of the states over which we respectively preside. Now I do assert (and my opportunities of information on this subject will justify my pretending to some authority) that in a case analogous to that of the *Resource*, the mode of proceeding in the state courts of *South Carolina* is by mandamus. Thus then stood the case: The owner of the *Resource* had an unquestionable right to a clearance: a right which is acknowledged by the collector himself (and not even denied by the attorney general.) He applies to the court to vindicate this right. That he was entitled to redress could not be doubted. In what form was that redress to be administered? The process law directs our inquiries to the

practice of the state of *South Carolina*. By the practice of that state, the process is by mandamus. It is said, the party may have been left to his action for damages; but would this have been putting him in possession of his right? It would have been an arbitrary substitution of a compensation instead of his right; and both in practice and theory would not have amounted to complete justice. There are rights which perish in the violation. These will admit of no other remedy; nor will the law allow any other redress for the acts of mere individuals. But for rights which continue to exist, notwithstanding their violation, and the violation of which is committed under semblance of sovereign authority, the dignity of the government, as well as the security of the citizens, requires an additional remedy. If in the construction of the act last noticed, it should be thought that I have given it a latitude not intended by the legislature, my reply is, that I can discover no other construction that will not totally annihilate its operation. The act prescribes certain terms and modes of process; but it would be as rational to suppose the existence of form without substance, as that these forms and modes of process could be adopted without relation to the cases in which they are known and practised in the several states. Should the want of technical precision in these acts have involved the court in error, the reply is, that the introduction of philological correctness into our laws at some stage of their progress would save the courts much trouble and much odium. This might be done before they pass from the hands of the executive.

3d. In considering the third and last question, viz. the propriety of issuing a mandamus in the case of the *Resource*, it will be found that the four grounds of the attorney general admit of a brief and very satisfactory answer.

The first is, "*that the law gave the collector complete discretion over the subject.*" The fact is otherwise. The discretion of the collector was limited to a particular case: that of his entertaining suspicion which he himself admits could not be entertained with regard to the *Resource*. Or it may be answered thus: the *instructions of the executive* deprived him of that

discretion. The mandate of the court obliged him to act according to the dictates of his own judgment, to which the law of congress had committed the interest of his fellow citizens, and not surrender a right of judging which must ever be entirely personal; and which we can never know by what motive congress may have been influenced in vesting in him, instead of any other officer of government.

The second argument is, "*that there was a controlling power in the chief magistrate of the United States.*" This is equally incorrect in the extent in which it has been laid down, and in which alone it would answer the purpose of the attorney general. The fact is, as has been before shown, that the power of the president to act upon the subject was confined to the particular case of a reference to him upon a previous detention by the collector; and did not authorize the president to prescribe to the collector in what cases he should detain. In cases where the collector had detained upon suspicion, on the dictates of his own judgment, the president could oblige him to discharge, but was not authorized to control him generally, in the exercise of the right of granting clearances in the first instance. Nothing was easier than for congress to have declared that the president should dictate generally to the collector upon this subject, if such had been their intention. This would have been giving the executive that latitude of power which was necessary to justify their instructions to the collector, but which cannot be extorted from the law under which they acted.

With regard to the third argument, "*that the parties had their legal remedy against the collector,*" I can assure the attorney general that it is both *usual* and *precedented* for courts to issue the writ of mandamus notwithstanding that circumstance, when that remedy is not adequate to the ends of justice and good government. In some cases, to save a party the necessity of pursuing a remedy in equity, or a remedy in its nature too tedious, this writ has been issued. The case of the commissioners of excise in 2 *Term Rep.* of which the attorney general is aware (and with his own answer to which I think

I perceive, that he is not satisfied) might have convinced him that this argument could not be relied on; for there also the action for damages might have been maintained. The total inadequacy of this action to the ends of justice in this case will be strikingly perceived if we reflect on the impossibility of finding any criterion by which to estimate the loss consequent upon the disappointment of a mercantile adventure, and how very incompetent the collector must individually have been to discharge the immense amount of damages which might have been awarded against him; especially as individuals could derive no indemnity from his bond to the government. Indeed the action for damages is, at best, but a poor dependence and but a substitute for more ample justice.

The fourth and last ground relied on by the attorney general is, *that the courts of Great Britain will not issue a mandamus to a mere ministerial officer, such as a county treasurer to compel him to a discharge of duty.* This was the case of the *King* v. *Brestow*, reported in 6 *Term Rep.;* but surely in order to point the argument founded on this case it was incumbent on the attorney general to have shown what analogy exists between the two officers of county treasurer and collector of the port of *Charleston;* and as the reason of the decision in the *King* v. *Brestow* was that the treasurer was punishable by indictment, it would seem that it should be shown by what authority this court could have proceeded against the collector in a similar manner. Had such a power existed in the court it would still have been a farce to institute a prosecution for an offence which the president could and most certainly would have pardoned even before conviction.

That an office is *merely ministerial*, is in fact no objection to the issuing of a mandamus; nor is it made, so far as I can recollect, (for I have not the case before me) in the *King* v. *Brestow*. It would be difficult to find a reason why, if the court can issue this process at all against public officers, it should not compel them to do justice to the citizens in a ministerial as well as a judicial capacity. In cases of direct subordination or accountability to some specified jurisdiction,

the court will not interpose the authority of this writ. That circumstance removes the necessity for lending its aid; and it is against the officer of government that it issues, not against the mere agent of that officer, whose acts are the acts of his principal.

As the attorney general lays much stress on the idea of the collector's being a mere ministerial officer, it is to be regretted that this argument was not attended with some analysis or exposition of that term. I know of no precise technical signification attached to the word ministerial, except in contradistinction to *judicial*. In its ordinary meaning it is rendered *attendant, acting at command, acting under superior authority*. In neither of these senses is it properly applicable to the office of collector. His functions are among the most important exercised by any officer of the *United States*, and call for the frequent exercise of his own will, judgment and discretion. He is at least as far from being merely ministerial, as the commissioners of excise. If the office of the collector be merely ministerial (in the sense in which the attorney general appears to use the term) he must be the officer of the president or the treasury department, and not of the *United States*. The president or secretary of the treasury must be individually and personally responsible for his civil acts. But the contrary is abundantly evident; for his duties are immediately assigned him by law. According to a just construction of that law, he must frame his conduct; and no instructions from the president or secretary of the treasury, (although founded on the attorney general's opinion) can be pleaded by him in justification, except in the single instance of an action on his own bond by the government. At least, so far as his duties are assigned him by law, and not left to be assigned him by the treasury or executive department, his office is not merely ministerial. Some other observations of the attorney general remain to be noticed, viz. that in giving redress by the process of mandamus, the courts may extend their claim to jurisdiction, to a general usurpation of power over the ministerial officers in the executive department; that it is a mode of

proceeding which takes away from the government the benefit of appeal, and interferes with the responsibility to which officers of government are subject by impeachment. With regard to the first of these observations, it is evident that the attorney general mistakes the object against which his complaint should be directed. The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the *United States*. Of these laws the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted. It is against the law, therefore, and not the courts, that the executive should urge the charge of usurpation and restraint: a restraint which may at times be productive of inconveniences, but which is certainly very consistent with the nature of our government: one which it is very possible the president may have deserved the plaudits of his country for having transcended, in ordering detentions not within the embargo acts, but which notwithstanding it is the duty of our courts to encounter the odium of imposing. Let us take this argument together with that which relates to the liability of officers to impeachment, and some others which are used by the attorney general, into one view; and to what conclusions do they lead us? The president is liable to impeachment; he is therefore not to be restrained by the courts. The collector (and every other officer with equal propriety, who holds his office at the will of the president) are his agents, mere ministers of his will; therefore they are not to be restrained by the process of the courts. The power given to them is power given to him; in subordination to his will they must exercise it. He is charged with the general execution of the laws; and the security of the citizen lies in his liability to impeachment, or in an action for damages against the collector. This would indeed be an improvement on presidential patronage. It would be organizing a band, which in the hands of an unprincipled and intrepid president (and we may have the misfortune to see such a one elevated to that post) could

be directed with an effect, but once paralleled in history. If these arguments have any force at all, as directed against the correctness of the circuit court's issuing the writ of mandamus, they would have equal weight to prove the impropriety of permitting them to issue the writ of habeas corpus; which is but an analogous protection to another class of individual rights, and might be urged to show that the whole executive department, in all its ramifications, civil, military and naval, should be left absolutely at large, in their conduct to individuals. What benefit results to the ruined citizen from the impeachment of the president, could we suppose it in the power of any individual to effect it? or what security from an action against a public officer whose circumstances may be desperate? But such is not the genius of our constitution. The law assigns every one his duty and his rights; and for enforcing the one and maintaining the other, courts of justice are instituted.

When a late president took upon him to advise and request an officer of the *United States* to do an act relating to foreign intercourse, which the people of the *United States* thought ought to have been left to that officer's own judgment, it is well remembered what a general sensation it excited; yet the general duty of the executive, *to superintend the foreign intercourse of the United States*, was just as strong a reason to induce the president to think himself authorized to dictate, or at least advise in that case, as the general duty *to see the laws executed* was in this.

The argument drawn from the liability of the officers of government to impeachment, I cannot help thinking unhappily applied in another view. If an officer attempt an act inconsistent with the duties of his station, it is presumed that the failure of the attempt would not exempt him from liability to impeachment. Should a president head a conspiracy for the usurpation of absolute power, it is hoped that no one will contend that defeating his machinations would restore him to innocence. If, in the present instance, the owner of the *Resource* had been ordered to be hanged, instead of ordering his vessel to be detain-

ed, and the courts of this district had rescued him from executive power, it is presumed that the attorney general would not contend, that the liability to impeachment was done away; although he would find no difficulty in showing that it was a case analogous to that of the mandamus: of *the violation of that careful discrimination which is marked between the several departments by the constitution.*

The objection, "that this mode of proceeding takes away the right of appeal," is but slightly touched upon by the attorney general; and probably, because, in revolving the subject, he perceived that it is no objection to the exercise of jurisdiction in the circuit courts of the *United States*, that there is no appeal from their decisions; as they actually possess and exercise a very extensive jurisdiction without appeal. If congress thought proper, they could prescribe a form of appeal from those courts to a higher tribunal in cases of mandamus, habeas corpus, injunction in equity, or any other summary remedy. I do not know that they could, constitutionally, vest this appellate jurisdiction in the attorney general; but they certainly could in the supreme court. Some may think that this complaint, of the loss of the right of appeal, might more properly have been heard from another quarter. Congress thought that they had given the merchant the security of an appeal in case of unreasonable detention by the collector. But this benefit must, at least, have been impaired when the court to which that appeal was given, not only prejudicated every case, but on the ground of its appellate jurisdiction, swallowed up the power of the court of the first resort.

I will dismiss this subject with two additional remarks. The courts of the *United States* never have laid claim to a controlling power over officers vested by law with an absolute discretion, not inconsistent with the constitution; for in such a case, the officer is himself the paramount judge and arbiter of his own actions. Nor would they, for the same reason, undertake to control the acts of an officer who is a mere agent of the executive or any other department, in the performance of whatever may be constitutionally, and is by law, submitted to the discre-

tion of that department; for in that case, the process of the court should be directed to the head of the department, or it should not issue at all. In such cases there is an evident propriety in leaving an injured individual to his action for damages; as it is only upon evidence of express malice or daring disregard to propriety, that this action could be maintained. In such a case, the *authority* to act is complete; but the motive is censurable. The courts will not interfere to *prevent* the act; because the law authorizes it. But as the law did not authorize it *for individual oppression*, they will give damages to the individual who suffers by the wanton exercise of a legal power. This subject was very fully considered in the case of *Marbury* v. *The secretary of state;* and to pursue it further, I should do little more than repeat the words of the court in that case. The discrimination between the cases in which a mandamus might, and might not issue to the secretary of state, will point out to those who consider it, *the limitation to this doctrine* in the idea of the judiciary.

2. Had the collector, in his return to the rule of court, made a question of their jurisdiction, the grounds upon which the court assumed it, would have been before the public; and the attorney general would not have had to pass an opinion upon a decision, with the grounds of which he was unacquainted; or, had the collector merely set forth the act of congress, and declared that it was in pursuance of that law, that he caused the detention of the ship in question, the court must have refused the mandamus, because he would then have claimed that exercise of discretion which the law vested in him; and as he was accountable only to the president for his motives, there would have been no difficulty, by due management between those officers, to have eluded the process of the court. With this mode of managing a difficult affair, the collector was not totally unacquainted; for something similar to it had been done in the case of *Bollman* the winter preceding. This quiet submission to judicial decision in the first instance had for its object the obtention of a legal sanction for the collector's acquiescence in the recent measures of the executive, or a legal exemption from it.

Either way the judiciary had to encounter responsibility and censure. It is very possible that the court may have erred in their decision. It is enough, however, and all that a judge, who has understanding enough to be conscious of his own fallibility, can pretend to, that there existed grounds at least specious for the issuing of the mandamus. Though the laws had not vested the power, the submission of the officers of government would, at least, excuse the act of the court. There never existed a stronger case for calling forth the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty. Indeed there is one remark relative to the attorney general's letter, which cannot have escaped the notice of the most superficial observer. The principal question, that on which it would seem that the executive was most interested to secure the public approbation, viz. *the legality* of the instructions given to the collector, is completely put aside; while the public attention is fixed upon another more abstruse and admitting of a greater variety of opinion. It may be possible to prove the court wrong in interposing its authority; but certainly establishing the point of their want of jurisdiction will not prove the legality of the instructions given to the collector. The argument is not that the executive have done right, but that the judiciary had no power to prevent their doing wrong. I cannot conclude without noticing the very obliging manner in which the attorney general concludes his letter. I hope he is sensible what a distinguished place he possesses in the esteem of that individual of the judges of this circuit, with whom he is personally acquainted. It is not the giving of his opinion, which has called forth this reply, but the publication of it.

These remarks have been withheld from the press for several weeks, from no cause but the extreme repugnance that I feel at agitating, in this manner, a question which I am sensible might, with much more dignity and relative delicacy, have been disposed of in another mode.

WILLIAM JOHNSON, jun.

Senate of the United States.

DECEMBER 31st 1807.

Case of the Honourable John Smith, Esq.

A senator from the state of *Ohio*, accused of a participation in the imputed treason of col. *Burr*.

MR. JOHN QUINCY ADAMS, from the committee appointed on the 27th of *November* last, to inquire whether it be compatible with the honour and privileges of this house, that *John Smith*, a senator from the state of *Ohio*, against whom bills of indictment were found at the circuit court of *Virginia*, held at *Richmond* in *August* last, for treason and misdemeanor, should be permitted any longer to have a seat therein, and to inquire into all the facts regarding the conduct of Mr. *Smith*, as an alleged associate of *Aaron Burr*, and report the same to the senate, submitted the following report:

Your committee are of opinion, that the conspiracy of *Aaron Burr* and his associates, against the peace, union, and liberties of these states, is of such a character, and that its existence is established by such a mass of concurring and mutually corroborative testimony, that it is incompatible, not only with the honour and privileges of this house, but with the deepest interests of this nation, that any person engaged in it should be permitted to hold a seat in the senate of the *United States*.

Whether the facts, of which the committee submit herewith such evidence as under the order of the senate, they have been able to collect, are sufficient to substantiate the participation of Mr. *Smith* in that conspiracy, or not, will remain for the senate to decide.

The committee submit, also to the consideration of the senate, the correspondence between Mr. *Smith* and them,

through their chairman, in the course of their meetings. The committee have never conceived themselves invested with authority to try Mr. *Smith*. Their charge was to report an opinion relating to the honour and privileges of the senate, and the facts relating to the conduct of Mr. *Smith*. Their opinion indeed cannot be expressed in relation to the privilege of the senate, without relating at the same time to Mr. *Smith's* right of holding a seat in this body; but in that respect the authority of the committee extends only to proposal, and not to decision. But as he manifested a great solicitude to be heard before them, they obtained permission from the senate to admit his attendance, communicated to him the evidence in their possession by which he was inculpated, furnished him in writing with the questions arising from it, which appeared to them material, and received from him the information and explanations herewith submitted as parts of the facts reported. But Mr. *Smith* has claimed as a right, to be heard in his defence by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the committee had been a circuit court of the *United States*. But it is before the senate itself, that your committee conceived it just and proper that Mr. *Smith's* defence of himself should be heard. Nor have they conceived themselves bound in this inquiry by any other rules than those of natural justice and equity, due to a brother senator on the one part, and to their country on the other.

Mr. *Smith* represents himself on this inquiry as solitary, friendless, and unskilled; contending for rights which he intimates are denied him; and the defender of senatorial privileges which he seems apprehensive will be refused him by senators, liable so long as they hold their offices to have his case made their own. The committee are not unaware, that in the vicissitudes of human events, no member of this body can be sure, that his conduct will never be made a subject of inquiry and decision before the assembly to which he belongs. They are sensible that the principles upon which they have acted ought to have the same operation upon their own claims

to privilege, as upon those of Mr. *Smith;* the same relation to the rights of their constituents, which they have to those of the legislature which he represents. They have deemed it their duty to advance in the progress of their inquiry with peculiar care and deliberation. They have dealt out to Mr. *Smith* that measure, which under the supposition of similar circumstances they would be content to find imparted to themselves; and they have no hesitation in declaring, that under such imputations, coloured by such evidence, they should hold it a sacred obligation to themselves, to their fellow senators, and to their country, to meet them by direct, unconditional acknowledgment or denial, without seeking a refuge from the broad face of day, in the labyrinth of technical forms.

In examining the question, whether these forms of judicial proceedings or the rules of judicial evidence ought to be applied to the exercise of that censorial authority, which the senate of the *United States* possesses over the conduct of its members, let us assume as the test of their application, either the dictates of unfettered reason, the letter and spirit of the constitution, or precedents domestic or foreign, and your committee believe that the result will be the same: that the power of expelling a member must in its nature be discretionary, and in its exercise always more summary than the tardy process of judicial tribunals.

The power of expelling a member for misconduct results, on the principles of common sense, from the interests of the nation, that the high trust of legislation should be invested in pure hands. When the trust is elective, it is not to be presumed that the constituent body will commit the deposit to the keeping of worthless characters. But when a man, whom his fellow citizens have honoured with their confidence, on the pledge of a spotless reputation, has degraded himself by the commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member; which

should have no remedy of amputation to apply until the poison had reached the heart.

The question upon the trial of a criminal cause, before the courts of common law, is not between guilt and innocence, but between guilt and the possibility of innocence. If a doubt can possibly be raised, either by the ingenuity of the party or of his counsel, or by the operation of general rules in their unforeseen application to particular cases, that doubt must be decisive for acquittal; and the verdict of not guilty, perhaps in nine cases out of ten, means no more than that the guilt of the party has not been demonstrated in the precise, specific and narrow forms prescribed by law. The humane spirit of the laws multiplies the barriers for the protection of innocence, and freely admits that these barriers may be abused for the shelter of guilt. It avows a strong partiality favourable to the person upon trial, and acknowledges the preference that ten guilty should escape, rather than that one innocent should suffer. The interest of the public, that a particular crime should be punished, is but as one to ten, compared with the interest of the party, that innocence should be spared. Acquittal only restores the party to the common rights of every other citizen; it restores him to no public trust; it invests him with no public confidence; it substitutes the sentence of mercy for the doom of justice; and to the eyes of impartial reason, in the great majority of cases, must be considered rather as a pardon than a justification.

But when a member of a legislative body lies under the imputation of gravated offences, and the determination upon his cause can operate only to remove him from a station of extensive powers and important trust, this disproportion between the interest of the public and the interest of the individual disappears: if any disproportion exists, it is of an opposite kind. It is not better that ten traitors should be members of this senate, than that one innocent man should suffer expulsion. In either case, no doubt, the evil would be great. But in the former it would strike at the vitals of the nation; in

the latter it might, though deeply to be lamented, only be the calamity of an individual.

By the letter of the constitution, the power of expelling a member is given to each of the two houses of congress, without any limitation other than that which requires a concurrence of two thirds of the votes to give it effect.

The spirit of the constitution is, perhaps, in no respect more remarkable, than in the solicitude which it has manifested to secure the purity of the legislature, by that of the elements of its composition. A qualification of age is made necessary for the members, to insure the maturity of their judgment; a qualification of long citizenship to insure a community of interests and affections between them and their country; a qualification of residence to provide a sympathy between every member and the portion of the union, from which he is delegated; and to guard, as far as regulation can guard, against every bias of personal interest and every hazard of interfering duties, it has made every member of congress ineligible to office which he contributed to create, and every officer of the union incapable of holding a seat in congress. Yet in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recal in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe, can it enter the imagination of a reasonable man, that the sanctuary of their legislation must remain polluted with his presence, until a court of common law, with its pace of snail, can ascertain whether his crime was committed on the right or on the left bank of a river; whether a puncture of difference can be found between the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable, because present at an overt act, or intangible to public justice because he only contrived and prepared it. Is it conceivable that a traitor to that country which has loaded him with favours, guilty to the common understanding of all mankind,

should be suffered to return unquestioned, to that post of honour and confidence, where in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calmness and indifference, session after session, to the voice of notorious infamy, until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote, recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life?

Such, in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals, as an apology for crippling the congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our constitution. They believe that the very purpose for which this power was given was to preserve the legislature from the first approaches of infection; that it was made discretionary because it could not exist under the procrastination of general rules. That its process must be summary because it would be rendered nugatory by delay.

Passing from the constitutional view of the subject, to that which is afforded by the authority of precedent, your committee find, that since the establishment of our present national legislature, there has been but one example of expulsion from the senate. In that case, the member implicated was called upon in the first instance, to answer whether he was the author of a letter, the *copy* of which only was produced, and the writing of which was the cause of his expulsion. He was afterwards requested to declare whether he was the author of the letter itself; and declining in both cases to answer, the fact of his having written it was established by a comparison of his hand writing, and by the belief of persons who had seen him write, upon inspection of the letter. In all these points the

committee perceive the admission of a species of evidence, which in courts of criminal jurisdiction would be excluded; and in the resolution of expulsion the senate declared the person inculpated *guilty of a high misdemeanor;* although no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case.

This event occurred in *July* 1797. About fifteen months before that time, upon an application from the legislature of *Kentucky*, requesting an investigation by the senate, of a charge against one of the members from that state, of perjury, which had been made in certain newspaper publications, but for which no prosecution had been commenced, the senate did adopt by a majority of sixteen votes to eight, the report of a committee, purporting that the senate had no *jurisdiction* to try the charge; and that the memorial of the *Kentucky* legislature should be dismissed. There were indeed very sufficient reasons of a different kind assigned in the same report, for not pursuing the investigation in that particular case any further; and your committee believe that in the reasoning of that report, some principles were assumed, and some inferences drawn, which were altogether unnecessary for the determination of that case; which were adopted without a full consideration of all their consequences; and the inaccuracy of which was clearly proved by the departure from them in the instance which was so soon afterwards to take place. It was the first time that a question of expulsion had ever been agitated in congress, since the adoption of the constitution. And the subject, being thus entirely new, was considered perhaps too much with reference to the particular circumstances of the moment, and not enough upon the numerous contingencies to which the general question might apply. Your committee state this opinion with some confidence, because of the sixteen senators, who, in *March* 1796, voted for the report dismissing the memorial of the *Kentucky* legislature; eleven, on the subsequent occasion in *July* 1797, voted also for that report, which concluded with a resolution for the expulsion of Mr. *Blount*. The other five were no longer present in the senate. Yet if the principles ad-

vanced in the first report, had been assumed as the ground of proceeding at the latter period, the senate would have been as impotent of jurisdiction upon the offence of Mr. *Blount*, as they had supposed themselves upon the allegation against Mr. *Marshall*.

Those parts of the fifth and sixth articles, amendatory to the constitution, upon which the report in the case of Mr. *Marshall*, appears to rely for taking away the jurisdiction of the senate, your committee suppose can only be understood as referring to prosecutions at law; to suppose that they were intended as restrictions upon powers expressly granted by the constitution to the legislature, or either of its branches, would in a manner annihilate the power of impeachment as well as that of expulsion. It would lead to the absurd conclusion that the authority, given for the purpose of removing iniquity from the seats of power, should be denied its exercise, in precisely those cases, which most loudly call for its energies. It would present the singular spectacle of a legislature vested with powers of expelling its members, of impeaching, removing and disqualifying public officers, for trivial transgressions beneath the cognizance of the law, yet forbidden to exert them against capital or infamous crimes.

Those two articles were in substance borrowed from similar regulations contained in that justly celebrated statute, which for so many ages has been distinguished by the name of the great charter of England. Yet in that country, where they are recognized as the most solid foundations of the liberties of the nation, they have never been considered as interfering with the power of expelling a member, exercised at all times by the house of commons: a power which there however rests only upon parliamentary usage, and has never been bestowed as in the constitution of the *United States*, by any act of supreme legislation. From a number of precedents which have been consulted, it is found that the exercise of this authority there, has always been discretionary, and its process always far otherwise compendious, than in the prosecutions before the judicial courts. So far indeed have they been from supposing

a conviction at law necessary to precede a vote of expulsion, that in one instance, a resolution to demand a prosecution, appears immediately after the adoption of the resolution to expel. In numerous cases the member submits to examination, adduces evidence in his favour, and has evidence produced against him, with or without formal authentication; and the discretion of the house is not even restricted by the necessary concurrence of more than a bare majority of the votes.

The provision in our constitution which forbids the expulsion of a member by an ordinary majority, and requires for this act of rigorous and painful duty, the assent of two thirds, your committee consider as a wise and sufficient guard against the possible abuse of this legislative discretion. In times of heat and violent party spirit, the rights of the minority might not always be duly respected, if a majority could expel their members, under no other control than that of their own discretion. The operation of this rule is of great efficacy, both over the proceedings of the whole body, and over the conduct of every individual member. The times when the most violent struggles of contending parties occur, when the conflict of opposite passions is most prone to excess, are precisely the times when the numbers are most equally divided; when the majority amounts to two thirds, the security in its own strength is of itself a guard against extraordinary stretches of power; when the minority dwindles to the proportion of one third, its consciousnes of weakness dissuades from any attempts to encroach upon the rights of the majority, which might provoke retaliation. But if expulsion were admissible only as a sequel to the issue of a legal prosecution, or upon the same principles and forms of testimony, which are established in the criminal courts, your committee can see no possible reason why it should be rendered still more imbecile, by the requisition of two thirds to give it effect.

It is now the duty of your committee to apply the principles, which they have here endeavoured to settle and elucidate, to the particular case upon which the senate have directed them

to report. The bills of indictment found against Mr. *Smith*, at the late session of the circuit court of the *United States*, at *Richmond*, (copies of which are herewith submitted) are precisely similar to those found against *Aaron Burr*. From the volume of printed evidence communicated by the president of the *United States* to congress, relating to the trial of *Aaron Burr*, it appears that a great part of the testimony, which was essential to his conviction upon the indictment for treason, was withheld from the jury, upon an opinion of the court, that *Aaron Burr*, not having been present at the overt act of treason alleged in the indictment, no testimony relative to his conduct or declarations elsewhere, and subsequent to the transactions on *Blannerhassett's* island could be admitted. And in consequence of this suppression of evidence, the traverse jury found a verdict "that *Aaron Burr*, was not proved to be guilty under that indictment by any evidence submitted to them." It was also an opinion of the court that none of the transactions of which evidence was given on the trial of *Aaron Burr* did amount to an overt act of levying war; and of course that they did not amount to treason. These decisions, forming the basis of the issue upon the trials of *Burr*, anticipated the event which must have awaited the trials of the bills against Mr. *Smith;* who, from the circumstances of his case, must have been entitled to the benefit of their application. They were the sole inducements upon which the counsel for the *United States* abandoned the prosecution against him.

Your committee are not disposed now to question the correctness of these decisions on a case of treason before a court of criminal jurisdiction. But whether the transactions proved against *Aaron Burr* did or did not amount, in technical language, to an overt act of levying war, your committee have not a scruple of doubt upon their minds that but for the vigilance and energy of the government and of faithful citizens under its directions, in arresting their progress and in crushing his designs, they would in a very short lapse of time have terminated not only in war, but in war of the most horrible description, in war at once foreign and domestic. As little hesitation

have your committee in saying, that if the daylight of evidence, combining one vast complicated intention, with overt acts innumerable, be not excluded from the mind by the curtain of artificial rules, the simplest understanding cannot but see what the subtlest understanding cannot disguise, crimes before which ordinary treason whitens into virtue, crimes of which war is the mildest feature. The debauchment of our army, the plunder and devastation of our own and foreign territories, the dissolution of our national union, and the root of interminable civil war, were but the means of individual aggrandizement, the steps to projected usurpation. If the ingenuity of a demon were tasked, to weave into one composition, all the great moral and political evils, which could be inflicted upon the people of these states, it could produce nothing more than a texture of war, dismemberment and despotism.

Of these designs, a grand jury, composed of characters as respectable as this nation can boast, have upon the solemnity of their oaths, charged *John Smith* with being an accomplice. The reasons upon which the trial of this charge has not been submitted to the verdict of a jury, have been shown by your committee, and are proved by the letter from the attorney of the *United States* for the district of *Virginia*, herewith reported. And your committee are of opinion, that the dereliction of the prosecution on these grounds cannot in the slightest degree remove the imputation which the accusations of the grand jury have brought to the door of Mr. *Smith*.

Your committee will not permit themselves to comment upon the testimony which they submit herewith to the senate, nor upon the answers which Mr. *Smith* has given as sufficient for his justification. Desirous as the committee have been that this justification might be complete, anxiously as they wished for an opportunity of declaring their belief of his innocence, they can neither control nor dissemble the operation of the evidence upon their minds, and however painful to their feelings, they find themselves compelled by a sense of duty, paramount to every other consideration, to submit to the senate, for their consideration, the following resolution.

Resolved, That *John Smith*, a senator from the state of *Ohio*, by his participation in the conspiracy of *Aaron Burr*, against the *peace*, *union* and *liberties* of the people of the *United States*, has been guilty of conduct incompatible with his duty and station as a senator of the *United States*. And that he be therefore, and hereby is expelled from the senate of the *United States*.

MR. HARPER. It now remains for me, Mr. President, to perform that part of the duty in this case which it has been thought proper that I should undertake, and to close the defence of Mr. *Smith*. Fortunately for me and for him my colleague has left me but little to do; for little indeed can be added to the force of those arguments, both on the law and the facts, by which this honourable body has been instructed and entertained. To present the subject in a few additional points of view, and to enlarge a little more on some of the arguments touched by my colleague, than fell within the limit which he had prescribed to himself, is all that I can hope to accomplish; and this I shall attempt with as much brevity as the nature and extent of the matter to be treated will permit.

And here let me premise, Mr. President, that if nothing but the character and fortune of Mr. *Smith* were involved in the decision to be pronounced in this case, we should abandon at once every legal objection, and confine the defence to the testimony alone; for it is the wish of the accused to be acquitted on the broad and plain ground of innocence; on the ground that in fact he has done nothing criminal or even improper; and not on the ground that the evidence against him is not such as the law permits to be received, or that the offences alleged against him do not in law warrant an expulsion.

But believing as we do, that constitutional rights of great importance in themselves, and embracing the whole community in their extent, will be most materially affected, should the principles contained in the report of the committee in this case be adopted by this honourable body; should it be determined that Mr. *Smith* can be proceeded against in this way,

upon this evidence, and for the acts with which he now stands charged; we, as integral members of the community to which those rights belong, feel it our duty, in behalf of ourselves and our fellow-citizens, as well as of our client, to enter our most solemn protest against the whole proceeding. We object therefore to the jurisdiction of the senate in this case, on the ground that the offence alleged against Mr. *Smith* is not cognizable by this body; and we also contend that the evidence adduced in support of the charge, is not such as the law permits to be received.

This brings me to the inquiry for what offences can the senate expel?

If this question, Mr. President, were "*res integra*," I might contend, on what I conceive to be solid constitutional ground, that the power of expulsion is confined to acts done in the presence of the senate; acts which tend to prevent or interrupt its deliberations, and which therefore the necessity of self-preservation, and the very nature and object of its institution, require that it should have the power promptly and effectually to suppress. This power is necessarily incident to every deliberative assembly. It would, I apprehend, exist in this honourable body by necessary implication, if the constitution had not given it in express words. Indeed the constitutional provision is to be considered rather as a limitation than as a grant of this power.

But I am aware, Mr. President, that the nature of the offences to which this power extends, is not a new question; and that the power of expulsion has already been carried, by a decision of the senate,* further than to acts done in the presence and view of the body. To this decision I am not now disposed to object. I acknowledge it as an authority so far as it goes. But it does not extend to our case, nor oppose the principle for which I mean to contend. The offence alleged against *William Blount*, though an offence of a dangerous and infamous nature, was not an offence for which he could have

* The case of *Wm. Blount*.

been indicted. And I am willing to admit that where a senator commits an offence of that nature, though not in the presence and view of the house, the senate may, from the necessity of the case, proceed immediately by way of expulsion. Otherwise they would be obliged to retain among them a member who might have rendered himself notoriously infamous.

But when the offence, as in this case, is the proper subject of indictment, I contend that this body must wait for an indictment, before it can expel.

For the constitution has provided that " in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

The constitution also gives the power of expulsion. But these two constitutional provisions are so to be construed, as that both may be effectual. One must not be allowed, by the extent of its operation, to destroy or infringe the other. By the course for which we contend, both provisions will be preserved. The accused will be tried in the manner prescribed by the constitution. If convicted, the record of his conviction will furnish unexceptionable testimony of his guilt; and this house may proceed to expulsion if the offence be of such a nature in their opinion as to require it.

Nor would I contend, Mr. President, that an acquittal on an indictment should, in all cases, be considered by this honourable body as proof of innocence. If the fact proved, though not coming within the legal definition of the offence charged in the indictment, were yet of a criminal or an infamous nature, the senate, upon having the evidence laid before them, might still proceed to expulsion; because it would then appear that the offence, though infamous or dangerous, was not indictable. As if a man should be indicted for perjury, and it should be clearly proved at the trial that he had taken a false oath, but he should escape conviction by showing, that it was not taken before a person authorized to administer the oath. On this evidence the senate ought to expel.

Or if evidence had been offered which was sufficient to satisfy every man's mind, that the offence charged in the indictment had been committed; but this evidence, on account of some legal objection to its competency, had been rejected by the court, and the offender consequently acquitted. Such an acquittal ought not to satisfy this honourable body. This evidence which the court, acting under strict and positive rules of law, could not receive, ought to be considered here; and if found worthy of belief, on full investigation, it ought to produce an expulsion. Many instances of this nature might be adduced; but they will readily occur to the minds of the honourable members.

Thus I admit, that the *nolle prosequi* entered in the case of Mr. *Smith* at *Richmond*, ought not to preclude the senate from proceeding; because it was entered on account of a legal exception taken and sustained in the case of col. *Burr*, which did not in any degree affect what may be called the moral merits of the case.

But where it is apparent, as in this case, that the offence charged, if it has been committed, is the proper subject matter of an indictment, and is still open to be tried in that way, I contend that an indictment ought to precede the exercise of the power of expulsion. It is clearly in the power of this house to order an indictment, whenever it shall receive such information concerning the conduct of any of its members as to make such a proceeding necessary. The proper course, when such information is laid before it, is to consider in the first place whether the offence charged be of an indictable nature, and whether the evidence capable of being adduced be such as a court of law can receive. Should the affirmative appear, the matter is to be referred to the public prosecutor of the district where the offence was committed, with an order from this house to prosecute the offender. Sould the negative appear, or should a prosecution take place and the offender escape by any legal exception, not affecting the moral merits of the case, the power of expulsion may then be exercised on the best evidence that the case will admit. Should he be acquitted

by the jury on a full view of the facts and on the broad ground of innocence, the acquittal ought to avail him here and every where. Should he be convicted the record of his conviction furnishes complete ground for his expulsion. Thus every part of the constitution is reconciled as far as the nature of things will permit.

But it may be said, shall the senate be compelled to retain in its bosom, while this long process of indictment is going on, a man whom every other member may believe to be guilty of the most infamous crimes? No. I would not carry the principle so far. In all doubtful cases, however strong the grounds of suspicion might appear to some men's minds, the member ought to be presumed innocent till his guilt is established in the manner provided by the constitution and the laws. But in some very flagrant cases, which may be supposed where the criminal act might be perfectly notorious, or might rest upon such proof as to leave no room for doubt, I would admit that the senate ought not to retain the offender in its bosom, but when it ordered a prosecution, might at the same moment sequester him from his seat, till his guilt or innocence should be legally established.

Such a step, as tending to prejudge the case, ought indeed to be taken with great caution, but it is easy to conceive of circumstances which might render it proper, and indeed indispensable.

Will it be objected that this proceeding by indictment is too slow for the occasion? But I ask whether the trial before the senate can be more speedy? To those who are of opinion that a member may be expelled without a trial, or, what is the same thing, without having time allowed him to collect evidence for his defence, I have nothing to say. But I would ask those who think that reasonable time ought to be allowed to a member for making his defence, whether, after some reflection and calculation, they can believe that such a trial here would consume less time, or require less delay, than a prosecution by indictment in the district where the offence is supposed to have been committed? If witnesses are to be heard,

consider from how great a distance they are to be brought! If you dispense with the personal attendance of witnesses and receive their depositions, consider in what remote places these depositions must be taken, and how much time must necessarily be consumed in taking and returning them! The act will generally be done in the district where the senator lives. That district may be *Maine*, *Kentucky* or *Georgia*. In that district the witnesses will generally be found, and from thence they or their depositions must be brought to *Washington*. But let the trial be before a jury in the district, and the witnesses are at hand. The whole investigation may therefore take place in less time, and in a manner incomparably more perfect and satisfactory, than before this honourable house.

I adduce what has happened in this very case, as a proof that I am correct in my position. Since this proceeding commenced, the circuit court of the *United States* has holden in the district of *Ohio*, where Mr. *Smith* lives, and where, if any where, all the acts alleged against him were done. We have heard of the proceedings and adjournment of that court: consequently in that court *John Smith* might have been tried for those acts, and the record of his acquittal or conviction might now be on your table.

But, Mr. President, however weighty I may think the objection which I have now urged, it is in my mind of far less moment than that which applies to the evidence in this case.

I do not contend that all the strict rules of the common law, relative to evidence in criminal cases, ought to be adhered to in the proceeding by expulsion. Many of them would tend more, perhaps, to the exclusion of truth, by shutting out that moral evidence which satisfies the mind, than to the protection of innocence. But there is one great rule of evidence, founded in the most solid reason and the most enlightened views of human nature, which is never departed from in our courts, and ought never to be departed from any where. That rule I mean which requires, that a man tried for an offence by which his safety or his fame may be affected, shall be confronted with the witnesses against him; shall have his accusers

face to face, before his judges and before the world; shall be enabled to refresh the recollection of the witness, and to probe his conscience by a cross examination; and thus to bring forth the truth to light, in spite of prevarication, forgetfulness, or inaccuracy of expression.

How much of the credit due to a witness depends upon his manner of given his testimony! Of this you cannot judge unless you have him before you. It is then only that you can observe the workings of his countenance, the tones of his voice, and the expression of his eye; that you can distinguish between the firm frankness of integrity, and the boldness of impudent and hardened guilt; between the timid accents and downcast eye of bashful rusticity, and the faultering voice and fallen looks of conscious hesitating perjury; between the natural consistency of truth, and the artificial connexion of studied falsehood.

Nor is this power of cross examination much less important in the case of an honest witness. For a dishonest witness its use is to probe his conscience; for an honest one, to refresh his recollection and correct his inaccuracies.

How often have we seen the most honest witness, in delivering his testimony before a court of justice, omit through forgetfulness or inadvertency, or perhaps through an opinion that they were unimportant, circumstances which when drawn forth by a cross examination appeared to be very material? How often have we seen such a witness express himself so inaccurately, as to convey a meaning entirely different from what it has appeared on a cross examination that he intended to express?

Without a cross examination, these effects, often so fatal, of misconception, forgetfulness, and inaccurate language, must pass uncorrected; and when the testimony is taken in writing, instead of being orally delivered to those who are to decide on it, they are exposed moreover to the misconceptions, the inaccuracy and the carelessness or haste of the writer.

How imperfect and deceptive must that testimony be, which comes to us through such a medium! It was to remedy this imperfection, so pregnant with danger to life, liberty and reputation, that our forefathers, breaking in this instance through the gloom of barbarism which surrounded them, adopted the profound and luminous rule for which I contend, and steadily adhered to it through every change of time and circumstances.

I therefore, solemnly protest, Mr. President, in my character of an *American* citizen, as well as in that of counsel for Mr. *Smith*, against the admission of depositions as evidence in this case. I protest against the admission of this clandestine, this furtive testimony, which shuns the light of day, and by which an honest man may at any time be rendered the victim of skulking perjury and cowardly malice. I claim for my client the privilege of being confronted with his accusers, at this bar, if here he must be tried; of subjecting the consciences of those accusers to the scrutiny of a cross examination, in the presence of his judges. And for myself, for him, and for every member of this community, I protest against the violation of a rule, handed down for our safety from the earliest times, regarded with increasing reverence by every successive generation, and held sacred amidst the wildest excesses of civil discord, of triumphant party vengeance, and of regal oppression.

But it may be said, as it has been very plainly intimated, in the report which is to be considered as the indictment in this case, that the rules of evidence need not be so strictly observed in trials of this kind, because the consequence of conviction is not a punishment, but merely the withdrawal of a trust.

And is there then no punishment, but that which immediately applies to the person or the purse? Is this idea, worthy of none but the most base and abject slaves, to be gravely and authoritatively promulgated to the *American* people? Are they to be told, and by a vote too of this house, that disgrace is not a punishment? that it is no punishment for an *American* citi-

zen to be stigmatized by the sentence of one branch of his government, to be driven for an imputed crime from the honourable station in which he had been placed; and to be held up to his family, his friends, his fellow citizens and posterity, as a wretch unworthy of public confidence or private regard? Is this no punishment? And will gentlemen who inculcate this idea, in application to my client, lay their hands on their hearts and tell me, whether they would not consider it as a punishment in application to themselves? whether they would not rather submit to the loss of their fortunes, or to any degree of bodily suffering, than to have such an opprobrium stampt on their names; such a stain fixed on the honour of their children.

Every honourable member of this body I am sure will answer in the affirmative; for who would not prefer bodily pain and the loss of property, to such disgrace as must result from an expulsion from this house, for the crime of which my client is accused.

Again, Mr. President: If Mr. *Smith* should be expelled on these depositions of *Elias Glover* and his coadjutor *M'Farland*, whom he has had no opportunity to cross-examine, he would still be liable to prosecution at law for this offence. On this prosecution no direct use could be made of the depositions of *Elias Glover* and *M'Farland*. Those witnesses must be produced in person. But still Mr. *Smith* would go before his jury with this expulsion stampt upon his forehead. Nothing could prevent this expulsion, produced by the ex parte clandestine depositions of *Glover* and *M'Farland*, from operating to his prejudice on the minds of the jury. And thus a species of evidence which the law expressly excludes from criminal prosecutions, would, through the act of this honourable body, thus rendered accessory to the violation of the laws, be allowed to produce a most important though indirect effect in a criminal case.

If therefore, Mr. President, we had no defence, or only a weak one, on the facts in the case, I should insist that this prosecution, being for an offence cognizable by indictment

and resting on evidence which the law excludes, ought to be dismissed. Standing, however, as my client does, strong on the facts, holding in my hand abundant proof of his innocence, I shall by no means rest his defence on this legal ground, impregnable as I deem it; but having entered in his name, and in my own as one of the *American* people, this protest against a proceeding which I regard as a violation of our constitutional privileges, I now proceed to investigate the evidence adduced in support of the charges against Mr. *Smith*, and to contrast it with that whereby his innocence is completely established.

I am to premise that the charge against Mr. *Smith* is, that he was connected with col. *Burr* in the late conspiracy. This connexion is alleged as the sole ground of expulsion; and it is attempted to be proved in various ways.

1. By the conversation stated by *Elias Glover* and *M'Farland.*

2. By the facts stated by *Peter Taylor.*

3. By the conversation stated by major *Riddle.*

4. By the conversation stated by col. *Jas. Taylor.*

5. By Mr. *Smith's* journey to *Frankfort* in 1806.

6. By the bill drawn by col. *Burr* on Mr. *Smith*, in favour of *Jacob Jackson.*

7. By that drawn on him by col. *Burr*, in favour of *Belknap.*

8. By a supposed contradiction between Mr. *Smith's* statement respecting the settlement of the *Washita* lands, in his deposition before *Matthew Nimmo*, and the facts which appeared in evidence at *Richmond.* And

9. By a supposed similarity between the style of the conversation stated in *Glover's* deposition, and that of Mr. *Smith's* own deposition before *Nimmo.*

By some of these proofs and circumstances, or by all of them taken together, it is contended that a criminal connexion between *Smith* and *Burr* in the late conspiracy is established; and it is therefore incumbent on me to consider them

all; which I shall proceed to do in the order in which they have been stated, and with as much brevity as the extent and variety of the matter will admit.

[The remainder of this speech is distinguished for that ingenuity and cogency of argument which characterizes this able advocate. But as it is confined to an examination of the testimony, and is therefore no further interesting than as it regards this particular case, it is omitted.]

LIBEL.

ON Tuesday, 25th *October* 1808, came on to be tried at a circuit court, held in the city of *Albany* before Mr. justice *Spencer*, the action commenced by *Abraham Van Vechten*, late recorder of that city, against *David J. Hopkins*, for the following libel, to wit:

" *State of New-York*, ss.
City and County of New-York.

I *HENRY MEIGS*, notary public in and for the state of *New-York*, duly commissioned and sworn, do hereby certify, that personally came and appeared before me, *David J. Hopkins* of *Morristown*, *New-Jersey*, lately from the college of *Middlebury*, state of *Vermont*, who being duly sworn by me saith, that sometime in *March* or the beginning of *April* 1806, he went to the office of *Abraham Van Vechten*, esq. in *Albany*, in company with major *John Lansing;* at the said office there arose some conversation between major *Lansing* and Mr. *Van Vechten*, in the course of which major *Lansing* made several severe remarks upon the political character of governor *Lewis;* in consequence of which remarks Mr. *Van Vechten* said to him, these severe remarks and animadversions which you have made respecting governor *Lewis* will not do; for we have agreed to support him at the ensuing election. Mr. *Van Vechten* then produced a written instrument, which he put into the hands of major *Lansing*, who read it; major *Lansing* then laid it down on the table, and went into conversation with Mr. *Van Vechten*. This deponent, while these gentlemen were conversing, turned over said instrument of

writing, which purported to be an agreement containing articles of coalition. The first was an engagement by several leading federal men, whose names were thereto subscribed, to support with all their strength and influence the next election of governor *Lewis*. In consideration of this federal article of agreement, there was an article stating the friends of governor *Lewis*, whose names were thereto subscribed, should exert all their power and influence to cause the election of *S. Van Rensselaer*, esq. to the office of governor in the gubernatorial election of 1810. This deponent believes that there were as many names subscribed to the said agreement as fifteen or twenty, principally quid and federal members of the legislature; that this deponent being on terms of intimacy with Mr. *Lansing*, had frequent conversations with him after the circumstances above stated had taken place, and in these conversations this deponent often heard major *Lansing* explicity state, that the coalition between the friends of the governor and the federal party was the only way and means of again restoring the federal party to power; and that the federal party was assured of the support and influence of the *Livingston* family for the same object above mentioned.

DAVID J. HOPKINS.

When, after proving the making of the libel, and its publication with the knowledge and consent of the defendant, and that the plaintiff was the only person of the name of *Abraham Van Vechten* resident in *Albany*, and that he kept an office there, and was at the time of making the said libel recorder of that city; and that he also was a member of the legislature in the months of *March* and *April* 1806, the plaintiff offered a witness to prove, that from the perusal of the libel itself, he considered Mr. *Van Vechten* to be one of the federal members of the legislature intended as a subscriber to the corrupt agreement charged in the libel, which testimony was overruled by the court, upon the ground that it was a mere construction of law to be deduced by the court from the libel, without the aid of any extrinsic testimony, who was the person intended: and his honour the judge thereupon further

decided, that it was not legally to be inferred from the libel that it had any application to Mr. *Van Vechten.*

To this opinion the plaintiff's counsel excepted; and its correctness is to be decided either upon a writ of error, or upon a case to be brought before the supreme court.

District Court of Pennsylvania.

SEPTEMBER 9th, 1808.

Embargo.

The United States of America *v.* the Schooner William and Samuel, Joseph Lopes, Master, and her Cargo.

Present, PETERS, Judge.

THIS was by a libel filled by Mr. *Dallas*, the district attorney, against the schooner *William and Samuel*, and her cargo, captured by lieutenant *Biddle* of the navy, for a breach of the laws relating to the embargo. The libel contained a variety of counts; and the vessel was claimed by *Jacob Clarkson* and *Samuel Lowth*, the owners; but no claim was filed for any part of the cargo. The claim alleged, that the vessel had been chartered to *Joseph Burr;* that she had received permission from the president, to proceed from *Philadelphia* to the *Havanna* for *American* property; and that the cargo was put on board, without the privity or approbation of the owners. The vessel, however, clandestinely took in goods, while in the port of *Philadelphia*, to a value exceeding 5000 dollars. *Samuel Lowth*, one of the owners, sailed in her as a passenger, according to the entry in the *manifest;* and when she was seized by order of lieutenant *Biddle*, after she had left the district of *Pennsylvania*, but still in the river *Delaware*, her hatches were battened down, &c. Messrs. *Ingersol*, *Hallowell* and *Milnor*, were counsel for the claimants, and upon mature consideration, agreed to the condemnation of the vessel upon the

last count of the information, which stated that goods exceeding the value of 400 dollars had been ladened on board without a permit from the proper officers. The cargo was condemned; no claim being filed, nor any objection made; reserving for the opinion of the court, the question whether the goods shipped under a permit were liable also to forfeiture.

The United States *v.* the Schooner Polly and Nancy, John Russel, Master, and her Cargo.

This libel was filled by Mr. *Dallas*, the district attorney, against the schooner *Polly and Nancy*, *John Russel*, master, a *British* owned vessel, and her cargo, seized by the collector for a breach of the laws relating to the embargo, by taking on board prohibited goods. Mr. *Hopkinson* appeared for the master, who was also the owner of the vessel; alleged that the illegal act was committed without the knowledge or approbation of his client; but submitted to the condemnation of the vessel and cargo, excepting the sea stores and provisions.

After hearing Mr. *Dallas*, on the one side, and Mr. *Hopkinson*, on the other, the court decided that upon general principles, as well as upon the particular words of the 5th section of the act of the 9th of *January* 1808, the sea stores and provisions could not be considered as a part of the cargo, liable to forfeiture.

The United States *v.* the Sloop Two Friends, Baptiste Genanty, Master, and her Cargo.

Mr. *Dallas* filed a libel against the sloop *Two Friends*, a *French* owned vessel, and her cargo, seized by the collector, for a breach of the laws relating to the embargo; and process of monition was ordered to issue in due form.

Circuit Court of the United States

FOR THE MARYLAND DISTRICT.

NOVEMBER TERM 1808.

REGULA.

ORDERED by the court, that in all trials hereafter to be had in this court, the proceedings thereon shall be as follows:

The plaintiff's counsel shall fully state his case and produce the evidence in support of it.

The defendant's counsel shall then fully state his defence and produce the evidence in support of it.

If the testimony on either side shall not be objected to by the adverse party at the time it is offered, the court will consider it as being admitted; but the court in their discretion will hear the objection to such evidence. If any evidence shall be objected to, the court will in their discretion hear and decide on the objection when made, or will direct the trial to go on until the residue of the case is before the court and jury, and then the court will consider the objection and decide thereon.

When the evidence shall thus have been closed on both sides, either party shall be at liberty to apply generally to the court for their direction to the jury in matters of law arising on all the facts, but shall at the same time state all the points and objections on which he intends to rely in support of such application; and the party opposing the direction, as prayed for, shall state all the points and objections on which he means to rely.

After the application and direction aforesaid, no new testimony shall be offered, unless the court shall think it necessary for the attainment of justice. But if such testimony is admitted, either party may make the same application and on the same terms as prescribed in the preceding rule.

The counsel, making application as aforesaid, shall be first heard. The adverse party shall then be heard; and the applicant shall reply and conclude, unless he shall have cited some new authority, in which case the adverse party shall be permitted to comment thereon.

When there are two counsel, one counsel shall open the case and the other conclude. When there are more than two, only two shall open and one conclude; and all the counsel on the side of the opposite party shall be heard as one, except in case of reply to new authority, when one only shall be heard.

[9th *December* 1808.]

Where a bill in equity shall have been or shall be filed in this court, and one or more of the defendants shall reside without this district, so that process of subpœna cannot be served; or where any person residing within or without the district and being served with process of subpœna shall fail to appear pursuant thereto, or having appeared, shall fail to answer the said bill within the time allowed, the court will direct a notice of such parts of the said bill, and of the object thereof and of the relief thereby prayed, to be published by advertisement in the newspapers or otherwise, as to them shall seem proper under the circumstances of the case, warning the defendant to appear in person or by solicitor, and to answer the said bill, or having appeared to answer thereto within such time as shall be appointed; and in case any such defendant shall fail to appear pursuant to such notice, or having appeared, to answer, the court will, on application of the complainant or complainants, order the general replication to be entered by the clerk of the court, and will thereupon issue a commission for taking depositions on the part of the complainant or complainants, on interrogatories filed with the clerk of this court one month before issuing such commission, in the same manner as if an answer and general replication had been filed by the defendant or defendants; and on the due return of such commission or commissions, the court will proceed to hear the cause and to decree as in other cases.

Provided, That if the said defendant or defendants shall, before the final hearing and decree, come in and show sufficient cause, the court will permit such defendant or defendants to answer and to take out another commission or commissions for the examination of witnesses as in other cases.

[9th *December* 1808.]

Baltimore County Court.

OCTOBER TERM, 1808.

John M'Kim, junr. *v.* Smith and Steene.

BILL OF EXCHANGE. ACCEPTANCE.

SAMUEL Brown, of *Chilicothe*, in the state of *Ohio*, being indebted to several merchants in *Baltimore*, sent his clerk to *Baltimore* with a considerable sum of money, directing him to distribute it in certain proportions among his creditors. Some of the creditors received their proportions; but several others received nothing. The defendants, knowing the distribution which had been ordered by *Brown*, prevailed on the clerk to deposit with them the whole of the money remaining in his hands, to the amount of 1625 dollars, for which they gave him the following receipt.

"*February* 8, 1805. Received of *Samuel Brown* by the hands of *Samuel Hayes* the sum of 1625 dollars, which we promise to hold subject to the order of *Samuel Brown*, or till his arrival here, which is expected."

"SMITH & STEENE."

This receipt was immediately transmitted to *Brown;* and *M'Kim*, the plaintiff, had sent his clerk, *Owings*, to the western country for the purpose of collecting money, who called on *Brown* for payment of the money due from him, and which had been due for several years. *Owings*, as agent to the plaintiff, pressed *Brown* urgently for money; and *Brown* said he was unable to pay in money, but offered an assignment of notes

and bonds, and also landed security to satisfy *M'Kim*. He also told *Owings* he had deposited 1625 dollars in the hands of *Smith* and *Steene* to pay his creditors in *Baltimore*, and *showed their receipt;* adding, at the same time that he owed the defendants nothing. *Owings* then proposed to take *Brown's* draft on the defendants for the *whole* amount. This, however, he refused to do, but gave the draft on the 12th *April* 1805, for 1000 dollars, and delivered the receipt to *Owings*. On the 16th *April*, *Owings* having left *Chilicothe*, and arrived at *New Lancaster*, forwarded the draft and receipt to the plaintiff at *Baltimore*. On the same day, the 16th, *Brown* wrote to the defendants from *Chilicothe*, expressing a wish that they would pay the draft, but without appearing to be certain they would do so; because he knew he was indebted to them, and seemed to suppose it probable they would hold the money to satisfy their own claim. *Owings* knew nothing of the contents of this letter, for he had been told by *Brown* that he was not indebted to the defendants. On the 30th *April*, the plaintiff presented the draft for payment, which was refused; but it does not appear whether *Brown's* letter to the defendants was received before or after the draft was presented; nor is it deemed to be material in deciding the case.

Upon this statement of facts the plaintiff's counsel moved the court to direct the jury, that the receipt given by the defendants under date of the 8th *February* 1805, amounts in law to an acceptance of the draft subsequently given by *Brown* on them in favour of the plaintiff.

Nicholson, C. J. [absent *Hollingsworth* and *Jones*, Justices.] The *usual* method of accepting a draft or bill of exchange is, by the drawee's writing and signing the acceptance on some part of the bill; but it is unquestionable, that a bill of exchange may be accepted either by parol or by a collateral writing. It is denied, however, that there can be an acceptance of a bill of exchange before the bill is drawn. But the case of *Pillans* v. *Van Mieross*, 3 *Burr.* 1663, is directly contrary; and I do not think its authority is shaken by any of the subsequent decisions, particularly when the general principle there laid down is re-

stricted, as in the case of *Pierson* v. *Dunlap*, *Cowp.* 573. For if an engagement to accept or to honour a bill is shown to a third person who is thereby induced to give a credit to the drawer, is not he who is the means of procuring the credit bound by every principle of moral honesty to support it? and can there be any substantial difference, whether this credit is procured *before* or *after* the bill is drawn? Is not the distinction attempted to be supported on the authority of *Clarke* v. *Cock*, 4 *East* 57. in reality a distinction without a difference? *Woodward* drew two bills upon *Cock* payable to his own order, and retained them in his own possession until after he had received *Cock's* letter, informing him they should be duly honoured. Before the receipt of that letter he had never made an effort to dispose of them; nor did he write *Cock* that they were in the possession of any other person. He expressly declared they were drawn to his own order; and after the receipt of *Cock's* letter he indorsed them to *Clarke* showing or stating the substance of *Cock's* promise to honour them. His indorsement was, in fact, a new drawing; and as the bills remained in his possession until after the promise to honour them, is there any material difference between a promise to honour them *after* they were drawn, but *before* they were indorsed away, and a promise to honour them *before* they were drawn? The essential part of the case is, that the promise to honour them was shown at the time the bills were negotiated; and they were negotiated upon the credit of the drawee. And this constitutes the difference between the case in 4 *East* and of *Johnson* v. *Collins* in 1 *East*. In *Johnson* and *Collins* there was no communication, no understanding between the drawee and the payee of the bill; but it was received upon the credit of the drawer, and not upon the faith of any engagement made by the drawee. It must have been in this view of the subject, that lord *Kenyon* made his very strong declaration, that a promise to accept a nonexisting bill was not binding as an acccptance. There are few transactions of a mercantile nature more common, even among ourselves, than for a person having a sum of money in *Baltimore*, and wishing to go to *Philadelphia* to deposit his money

in one of the banks here, and to take a certificate from the cashier of the bank that he is authorized to draw for that sum. Will it be said by a lawyer that a bill drawn in *Philadelphia* and negotiated upon the faith of this certificate would not be binding upon the bank which gave the certificate? And if the principle will apply to a public institution, can it be doubted that it will equally apply to an individual?

But it is said that this is not an engagement to accept a bill, but a promise only *to hold the money subject to the order of Brown;* and where is the difference? When you say you hold money subject to the order of another, do you not mean that you hold it subject to every species of order which that other can give, and which will afford you a legal and competent authority to pay? Is not a bill of exchange an order? and an order too of the highest grade, affording a full and entire authority to pay? Does it not answer completely the description contained in the receipt, and upon the production of which you engage to pay? For no other meaning can be annexed to the words "subject *to the order of Brown*," than that *Smith* and *Steene* will pay the money over when *Brown* directs them to do so; and an acceptance of a bill of exchange is nothing more than a promise to pay it.

It is said too that the money might have been drawn out of the hands of *Smith* and *Steene* by a verbal order or by a letter: this is certainly true; and if it was subject to these inferior species of orders why not to an order of the highest grade? If the receipt could be construed to be a promissory note, which I cannot admit, yet it ought not to receive such a construction in this case. When an instrument is susceptible of two different constructions, it shall receive that which the parties intended it should bear, provided it be a legal one; and it cannot be imagined that *Smith* and *Steene*, when they passed the receipt, or *Brown's* clerk when he took it, intended that it should be negotiable paper. *Brown's* clerk unquestionably meant that the money should be paid to *Brown's* order; and if *Smith* and *Steene* meant any thing else they were guilty of a fraud.

The defendants' counsel allege that no consideration was paid for the bill; and that *Brown* obtained no credit upon the receipt. A preexisting debt is a good consideration for every species of contract known to the law, where the person owing the debt engages to do or give something in lieu of it. It is a good consideration in a deed conveying land; and it is also a good consideration for a bond, bill, note or bill of exchange. To say that *Brown* obtained no credit upon the receipt is to make the receipt a mere trick to deceive; and *M'Kim* is to be the innocent victim. His clerk was at *Chilicothe* pressing *Brown* for money. He was offered an assignment of bonds and notes, and even landed security. Upon *Brown's* saying he had money in *Baltimore* which he could draw for, and exhibiting the receipt to prove the fact, the clerk relinquished the other means of security and took the draft accompanied by the receipt. Does not this then bring the case within the principle laid down by lord *Mansfield* in *Cowper* 573. and recognized in the later authorities? The receipt was exhibited to a third person who was induced to receive a bill drawn upon its credit, and to relinquish other means of securing a preexisting debt; and the receipt must be deemed in law an acceptance of the bill subsequently drawn upon it. It so far procured *Brown* a credit, that the notes and bonds which he offered to assign and the land proposed to be mortgaged might be afterwards disposed of by him for the benefit of his other creditors, or to any other use which *Brown* might think proper.

Smith and *Steene* have violated their engagement. They promised to hold the money subject to *Brown's* order, or in other words, to pay such orders as he might draw upon them for the amount; and they now insist on holding it subject to their own claim.

I am of opinion that the direction prayed by the plaintiff's counsel must be given to the jury.

CIVIL LAW.

A translation of the Ninth Title of the Fourth Book of the Digests, entitled Nautæ, Caupones, Stabularii, *ut recepta restituunt.*

We have a translation of the several titles and laws of JUSTINIAN'S DIGEST and CODE, which relate to maritime affairs. Considering them of importance, as the foundation of the maritime and commercial law of *Europe*, we shall insert them successively in this Journal.

DIGEST, Book IV. Tit. IX.

Of the responsibility of Mariners, Inn and Stable Keepers.

LAW I.

Ulpian, lib. 14. ad Edictum.

AIT prætor. The prætor says, if the mariners, Inn and stable keepers, do not restore what they have received for safe keeping, I will give judgment against them.*

Maxima utilitas. § 1. This edict is extremely useful, as it is necessary to confide in the honesty of most of these people, and give them things to keep. And it must not be thought that this law is hard upon them; for they are at liberty to receive or not: and unless it was so ordered, an opportunity would be given to them to combine with thieves against their freighters and passengers, since, even now, they do not abstain from such frauds.

Qui sunt igitur. § 2. It is necessary, therefore, to inquire who are those that are so bound. The *prætor* says, mariners. By this name, (*nautæ*) we must understand the person who

* For the convenience of reference, we have thought proper to preserve the commencing words of each section.

commands a vessel (*qui navem exercet*) although they are all called mariners who are on board of a vessel for the purpose of navigating her. But here the *prætor* means only the commander (*exercitor*); and, says *Pomponius*, he ought not to be bound by the act of the boatswain or oarmen (*remigem*), or of the midshipmen (*mesonautam*), but by his own or that of the mate; although, if he directed any thing to be committed to the charge of the crew he is to be answerable.

Et sint quidam. § 3. There are some on board of vessels who are specially appointed to guard them, as the ναυφυλακες, or, ship's guardians, (*and dietarii, stewards or pursers*). If any of these persons receive any thing, I think an action will be against the *exercitor;* because by appointing them to an office of this kind, he permits them to receive commissions; but even if it should not be so, the master is still bound *de recepto.*

De exercitoribus. § 4. Nothing is said as to hoymen or ferrymen, but *Labeo* says, the same law ought to obtain with regard to them; and so it is held with us.

Caupones autem. § 5. We also call tavern or stable keepers, the masters of inns or stables, or those who act for them. But they are not bound by the acts of their menial or most inferior servants.

Ait prætor, quod. § 6. The *prætor* says, *whatever they receive for safe keeping.* That is to say, whatsoever thing or merchandise they receive. Hence, *Vivianus* says, that this law extends to things like merchandise, as clothing to be used on board the ship, and other things in daily use.

Item Pomponius. § 7. Also *Pomponius*, book 34, writes, it is no matter whether we trust our own goods or those of others, if it is our interest that they should be kept safe. They ought to be returned to us rather than to those to whom they belong. And, therefore, if I take goods in pawn and trust them to the master of a vessel, he is bound to deliver them to me in preference to the person who has pledged them.

Recepit autem. § 8. If the thing have been sent on board, he is considered *ipso facto* as having received them for safe

keeping, whether they have been sent to *him* personally or not; and I think that he is considered as having in his custody, every thing that is carried on board; and that he is to answer, not only for the *mariners* but for the *passengers*.

LAW II.

Gaius. lib. 5. Ad edict. provinc.

Sicut et caupo. The tavernkeeper is, in like manner, bound for the act of the travellers who are in his house.

LAW III.

Ulpian. lib. 14. Ad edict.

Et ita de facto. And thus *Pomponius* writes, *lib.* 34. on the subject of the water carriers (*vectores*). The same writer says, that although the things be not yet received on board of the vessel, but should perish ashore, it is at the risk of him who has once received them.

Ait prætor. § 1. The prætor says, *unless they restore, I will give judgment against them.* An action therefore lies upon this edict. But whether this action be necessary is a matter to be inquired into, because a civil action will also lie in this case. Why then is a special action instituted when there are civil actions existing? unless, perhaps, the prætor should have had in view to repress *the dishonesty of that class of people;* or because the action *ex locato conducto* is founded on neglect, and that *ex deposito* only in fraud. Every one, however, is bound by this edict, although the thing perished without his fault or the damage was suffered, unless it happened *damno fatali.* Hence *Labeo* writes, if any thing shall perish by shipwreck or by pirates, it will not be unjust to allow it as an exception. The same to be said if *vis major* shall happen in an inn or stable.

Eodem modo. § 2. Inn and stable keepers are held in the same manner for what they receive in the actual exercise of their business; otherwise if they receive it out of the usual course of their business, they shall not be so bound.

Si filius familias. § 3. If a son or servant shall receive, with the consent of the father or master, they shall be liable jointly and severally. Also, if the servant of a master of a vessel shall steal or occasion damage, the *actio noxalis* shall cease; because the master is liable in his own name *ob receptum.* If, however, the master has not been consenting, the action *de peculio* shall lie.

Hoc autem rei. § 4. This action *(de recepto)* being for the thing itself, as *Pomponius* says, shall not abate by the death of the defendant, but be continued against the heir.

Novissime videndum. § 5. This relates merely to the form of bringing the action, as whether the penal and civil action can be joined.

LAW IV.

Paulus, lib. 13. Ad edict.

Sed et ipsi nautæ. But the action of theft belongs to the mariner who is in danger of suffering from it, unless he should steal himself and be robbed afterwards; or unless he should not be liable for the thing stolen by the other.

Si nauta nautæ. § 1. If a mariner shall receive the property of a mariner, an innkeeper of an innkeeper, or a stablekeeper of a stablekeeper, he shall be liable in like manner.

Vivianus dixit. § 2. *Vivian* says that this edict also extends to things which are put into the vessel after the merchandise, and for which no freight is due: as clothes, provisions, &c. as being accessory to the location of the other things.

LAW V.

Gaius. lib. 5. Ad edict. provinc.

Nauta et caupo. Mariners and innkeepers are not paid for the *custody* of things; but the mariner for carrying passengers, the innkeeper for lodging travellers at his inn, and the stablekeeper for taking beasts in his stable; and yet they are held *custodiæ nomine.* So the fuller and tailor receive a reward, not for

the keeping of goods but for the art which they employ upon them; and yet they are bound *ex locato, custodiæ nomine.*

Quæcumque de furto. § 1. Whatsoever we have said of theft must be understood of damage; for it cannot be doubted but that he who receives things to be kept safely is bound to preserve them from damage as well as from theft.

LAW VI.

Paulus, lib. 22. Ad edict.

Licet gratis. Although you navigate gratis or are entertained gratis at an inn, yet those actions shall not be denied to you if you have sustained damage by injury.

Si servo meo. §. If you make use of my servant in a ship or tavern, and he occasions damage to me, or commits theft, although the action of theft and the damage is mine, yet this action, because founded upon the fact will lie for me in the name of my servant against you. It will be the same, if the servant is common between us. You, however, will have an action against me *pro socio* or *communi dividendo;* or if you have hired part or the whole of him, then you will have me bound *ex conducto.*

Sed si. § 2. But if the damage be done against him (the servant) by another who is in the same ship or tavern, I think no useful action will lie *eo nomine.*

In factum actione. § 3. The innkeeper is liable to the action *in factum* (*action on the case*) for those who lodge in his inn; but it does not belong to him who is received there transiently as a traveller.

Possumus autem. § 4. We may, however, use the action of theft or that of *damni injuria* with mariners; but we must be contented with one action; and if we act against the owner or master, we must lend him our action, although he has an action *ex conducto* against them. But if the owner or master is absolved from this action, and it is afterwards brought against the mariner, he shall be allowed to plead it; that the same man's cause may not be tried twice. And *vice versa*, a plea shall also be given.

LAW VII.

Ulpianus, lib. 18. Ad edict.

Debet exercitor. The master must answer for the acts of all his mariners, whether slaves or freemen; and it is very proper he should answer, as he himself appoints them. But he does not answer further than for damage done on board of his vessel; and he is not to answer for any thing done out of the vessel although by mariners. Neither is he bound, if he first gave notice, that *every one should take care of his own things; and that he would not answer for the damage;* and if the passengers agreed to it.

Hæc actio. §. This merely concerns the *form* of the action.

Sed si quid nautæ. § 2. But if the mariners occasion damage to each other, no action lies against the master. But one who is both a mariner and a merchant will be entitled to this action.

Si servus nautæ. § 3. If the servant of the mariner occasions damage, although he is not a mariner, an useful action will justly lie against the master or owner.

Hæc autem actione. § 4. For the owner or master is liable to this action in his own name, who admitted such persons; and therefore if they should die, the action shall not abate. But in the name of his own servants, he will only be liable to the *actio noxalis.* For when he admits the servants of other people, he should first satisfy himself as to their character; but he is pardonable as to his own whom he employs for the use of the vessel.

Si plures navem. § 5. If several own the vessel, each shall be liable, in proportion to his interest in the ship.

Hæc judicia. § 6. These judgments, although honourary, are, however, perpetual; yet they shall not be given against the heir. Therefore if a servant commands a vessel and dies, the action *de peculio* shall not lie against the master, nor within the year. But if a servant or son command or keep a vessel, inn or stable with the consent of the father or master, I think they shall be liable to this action jointly and severally (*in solidum*) as having jointly received the profits.

(To be continued.)

AMERICAN STATE PAPER.

Message from the President of the United States, to both Houses of Congress at the commencement of the second Session of the tenth Congress, November 8, 1808.

To the Senate and House of Representatives
of the United States.

IT would have been a source, fellow citizens, of much gratification, if our last communications from *Europe* had enabled me to inform you, that the belligerent nations, whose disregard of neutral rights has been so destructive to our commerce, had become awakened to the duty and true policy of revoking their unrighteous edicts. That no means might be omitted to produce this salutary effect, I lost no time in availing myself of the act authorizing a suspension, in whole or in part, of the several embargo laws. Our ministers at *London* and *Paris* were instructed to explain, to the respective governments there, our disposition to exercise the authority in such manner as would withdraw the pretext on which the aggressions were originally founded, and open the way for a renewal of that commercial intercourse which it was alleged on all sides had been reluctantly obstructed. As each of those governments had pledged its readiness to concur in renouncing a measure which reached its adversary through the incontestable rights of neutrals only, and as the measure had been assumed by each as a retaliation for an asserted acquiescence in the aggressions of the other, it was reasonably expected that the occasion would have been seized by both for evincing the sincerity of their professions, and for restoring to the commerce of the *United States* its legitimate freedom. The instructions to our ministers, with respect to the different belligerents, were necessarily modified with a reference, to their different circumstances, and to the condition annexed by law to the executive power of suspension, requiring a degree of security to our commerce which would not result from a re-

peal of the decrees of *France*. Instead of a pledge, therefore, for a suspension of the embargo as to her in case of such a repeal, it was presumed that a sufficient inducement might be found in other considerations, and particularly in the change produced by a compliance with our just demands by one belligerent, and a refusal by the other, in the relations between this other and the *United States*. To *Great Britain*, whose power on the ocean is so ascendant, it was deemed not inconsistent with that condition, to state explicitly, that on her rescinding her orders in relation to the *United States*, their trade would be opened with her, and remain shut to her enemy, in case of his failure to rescind his decrees also. From *France* no answer has been received, nor any indication that the requisite change in her decrees is contemplated. The favourable reception of the proposition to *Great Britain* was the less to be doubted as her orders of council had not only been referred for their vindication to an acquiescence on the part of the *United States* no longer to be pretended; but as the arrangement proposed, whilst it resisted the illegal decrees of *France*, involved, moreover, substantially, the precise advantages professedly aimed at by the *British* orders. The arrangement has, nevertheless, been rejected.

This candid and liberal experiment having thus failed, and no other event having occurred on which a suspension of the embargo by the executive was authorized, it necessarily remains in the extent originally given to it. We have the satisfaction, however, to reflect, that in return for the privations imposed by the measure, and which our fellow citizens in general have borne with patriotism, it has had the important effects of saving our mariners, and our vast mercantile property, as well as of affording time for prosecuting the defensive and provisional measures called for by the occasion. It has demonstrated to foreign nations the moderation and firmness which govern our councils, and to our citizens the necessity of uniting in support of the laws and the rights of their country, and has thus long frustrated those usurpations

and spoliations which, if resisted, involved war, if submitted to, sacrificed a vital principle of our national independence.

Under a continuance of the belligerent measures, which in defiance of laws which consecrate the rights of neutrals, overspread the ocean with danger, it will rest with the wisdom of congress to decide on the course best adapted to such a state of things; and bringing with them, as they do, from every part of the union, the sentiments of our constituents, my confidence is strengthened that in forming this decision, they will, with an unerring regard to the essential rights and interests of the nation, weigh and compare the painful alternatives out of which a choice is to be made. Nor should I do justice to the virtues, which on other occasions have marked the character of our fellow citizens, if I did not cherish an equal confidence, that the alternative chosen, whatever it may be, will be maintained with all the fortitude and patriotism which the crisis ought to inspire.

The documents, containing the correspondences on the subject of the foreign edicts against our commerce, with the instructions given to our ministers at *London* and *Paris*, and now laid before you.

The communications, made to congress at their last session, explained the posture in which the close of the discussions relative to the attack by a *British* ship of war on the frigate *Chesapeake* left a subject on which the nation had manifested so honourable a sensibility. Every view of what had passed authorized a belief that immediate steps would be taken by the *British* government for redressing a wrong, which, the more it was investigated appeared the more clearly to require what had not been provided for in the special mission. It is found that no steps have been taken for the purpose. On the contrary, it will be seen in the documents laid before you, that the inadmissible preliminary, which obstructed the adjustment, is still adhered to; and, moreover, that it is now brought into connexion with the distinct and irrelative case of the orders in council. The instructions which had been given to our minister at *London*, with a view to facilitate, if neces-

sary, the reparation claimed by the *United States*, are included in the documents communicated.

Our relations with the other powers of *Europe* have undergone no material changes since your last session. The important negotiations with *Spain*, which had been alternately suspended and resumed, necessarily experience a pause, under the extraordinary and interesting crisis which distinguishes her internal situation.

With the *Barbary* powers we continue in harmony, with the exception of an unjustifiable proceeding of the dey of *Algiers* towards our consul to that regency. Its character and circumstances are now laid before you, and will enable you to decide how far it may either now or hereafter call for any measures not within the limits of the executive authority.

With our *Indian* neighbours the public peace has been steadily maintained. Some instances of individual wrong have as at other times taken place, but in no wise implicating the will of the nation. Beyond the *Mississippi*, the *Ioways*, the *Sacs* and the *Alibamas*, have delivered up for trial and punishment individuals from among themselves accused of murdering citizens of the *United States*. On this side of the *Mississippi*, the *Creeks* are exerting themselves to arrest offenders of the same kind; and the *Choctaws* have manifested their readiness and desire for amicable and just arrangements respecting depredations committed by disorderly persons of their tribe. And generally, from a conviction that we consider them as a part of ourselves, and cherish with sincerity their rights and interests, the attachment of the *Indian* tribes is gaining strength daily, is extending from the nearer to the more remote, and will amply requite us for the justice and friendship practised towards them. Husbandry and household manufacture are advancing among them, more rapidly with the southern than northern tribes, from circumstances of soil and climate; and one of the two great divisions of the *Cherokee* nation have now under consideration to solicit the citizenship of the *United States*, and to be identified with us in laws and government in such progressive manner as we shall think best.

In consequence of the appropriations of the last session of congress for the security of our seaport towns and harbours, such works of defence have been erected as seemed to be called for by the situation of the several places, their relative importance, and the scale of expense indicated by the amount of the appropriation. These works will chiefly be finished in the course of the present season, except at *New York* and *New Orleans*, where most was to be done: and although a great proportion of the last appropriation has been expended on the former place, yet some further views will be submitted to congress for rendering its security entirely adequate against naval enterprise. A view of what has been done at the several places, and of what is proposed to be done, shall be communicated as soon as the several reports are received.

Of the gunboats authorized by the act of *December* last, it has been thought necessary to build only one hundred and three in the present year. These, with those before possessed, are sufficient for the harbours and waters most exposed; and the residue will require little time for their construction when it shall be deemed necessary.

Under the act of the last session for raising an additional military force, so many officers were immediately appointed as were necessary for carrying on the business of recruiting, and in proportion as it advanced, others have been added. We have reason to believe their success has been satisfactory, although such returns have not yet been received as enable me to present you a statement of the numbers engaged.

I have not thought it necessary, in the course of the last season to call for any general detachments of militia or of volunteers, under the laws passed for that purpose. For the ensuing season, however, they will be required to be in readiness, should their service be wanted. Some small and special detachments have been necessary to maintain the laws of embargo, on that portion of our northern frontier which offered peculiar facilities for evasion; but these were replaced as soon as it could be done by bodies of new recruits. By the aid of these, and of the armed vessels called into service in other quarters, the spirit of diso-

bedience and abuse, which manifested itself early, and with sensible effect while we were unprepared to meet it, has been considerably repressed.

Considering the extraordinary character of the times in which we live, our attention should unremittingly be fixed on the safety of our country. For a people who are free, and who mean to remain so, a well organized and armed militia is their best security. It is therefore incumbent on us, at every meeting, to revise the condition of the militia, and to ask ourselves if it is prepared to repel a powerful enemy at every point of our territories exposed to invasion? Some of the states have paid a laudable attention to this object; but every degree of neglect is to be found among others. Congress alone having the power to produce an uniform state of preparation in this great organ of defence, the interests which they so deeply feel in their own and their country's security will present this as among the most important objects of their deliberation.

Under the acts of *March* 11th and *April* 23d, respecting arms, the difficulty of procuring them from abroad during the present situation and dispositions of Europe induced us to direct our whole efforts to the means of internal supply. The public factories have therefore been enlarged, additional machineries erected, and in proportion as artificers can be found or formed, their effect, already more than doubled, may be increased so as to keep pace with the yearly increase of the militia. The annual sums appropriated by the latter act have been directed to the encouragement of private factories of arms; and contracts have been entered into with individual undertakers to nearly the amount of the first year's appropriation.

The suspension of our foreign commerce, produced by the injustice of the belligerent powers, and the consequent losses and sacrifices of our citizens, are subjects of just concern. The situation into which we have thus been forced has impelled us to apply a portion of our industry and capital to internal manufactures and improvements. The extent of this conversion is daily increasing; and little doubt remains that the establishments formed and forming, will, under the auspices of cheaper

materials and subsistence, the freedom of labour from taxation with us, and of protecting duties and prohibitions, become permanent. The commerce with the Indians too, within our own boundaries, is likely to receive abundant aliment from the same internal source; and will secure to them peace and the progress of civilization undisturbed by practices hostile to both.

The accounts of the receipts and expenditures during the year ending on the 30th day of *September* last, being not yet made up, a correct statement will hereafter be transmitted from the treasury. In the meantime it is ascertained that the receipts have amounted to near eighteen millions of dollars; which with the eight millions and a half in the treasury at the beginning of the year, have enabled us after meeting the current demands, and interest incurred, to pay two millions three hundred thousand dollars of the principal of our funded debt, and left us in the treasury on that day near fourteen millions of dollars. Of these, five millions three hundred and fifty thousand dollars will be necessary to pay what will be due on the first day of *January* next, which will complete the reimbursement of the eight per cent. stock. These payments, with those made in the six years and a half preceding, will have extinguished thirty three millions five hundred and eighty thousand dollars of the principal of the funded debt, being the whole which could be paid or purchased within the limits of the law and of our contracts; and the amount of principal thus discharged will have liberated the revenue from about two millions of dollars of interest, and added that sum annually to the disposable surplus. The probable accumulation of the surpluses of revenue beyond what can be applied to the payment of the public debt, whenever the freedom and safety of our commerce shall be restored, merits the consideration of congress. Shall it lie unproductive in the public vaults? Shall the revenue be reduced? or shall it not rather be appropriated to the improvements of roads, canals, rivers, education and other great foundations of prosperity and union under the powers which congress may already pos-

sess, or such amendment of the constitution as may be approved by the states? While uncertain of the course of things the time may be advantageously employed in obtaining the powers necessary for a system of improvement, should that be thought best.

Availing myself of this, the last occasion which will occur of addressing the two houses of the legislature at their meeting, I cannot omit the expression of my sincere gratitude, for the repeated proofs of confidence manifested to me by themselves and their predecessors since my call to the administration, and the many indulgences experienced at their hands. The same grateful acknowledgments are due to my fellow citizens generally, whose support has been my great encouragement under all embarrassments. In the transaction of their business I cannot have escaped error. It is incident to our imperfect nature. But I may say with truth my errors have been of the understanding, not of intention; and that the advancement of their rights and interests has been the constant motive for every measure. On these considerations I solicit their indulgence. Looking forward with anxiety to their future destinies, I trust that in their steady character, unshaken by difficulties, in their love of liberty, obedience to law, and support of the public authorities, I see a sure guarantee of the permanence of our republic; and retiring from the charge of their affairs, I carry with me the consolation of a firm persuasion that heaven has in store, for our beloved country, long ages to come of prosperity and happiness.

TH: JEFFERSON.

November 8, 1808.

Documents accompanying the Message from the President of the United States at the commencement of the Second Session of the Tenth Congress. November 9, 1808.

Extracts of letters from Mr. Madison to Gen. Armstrong.

Mr. Madison, Secretary of State, to General Armstrong, Minister Plenipotentiary of the United States at Paris.

Department of State, May 22, 1807.

" THE two last letters received from you were of *December* 24 and *January* 16.

" The decree of *November* 21, communicated in the first, had previously reached us, and had excited apprehensions which were repressed only by the inarticulate import of its articles, and the presumption that it would be executed in a sense not inconsistent with the respect due the treaty between *France* and the *United States*. The explanations given you by the minister of marine were seen by the president with much pleasure; and it only remains to learn that they have been confirmed by the express authority of the emperor. We are the more anxious for this information, as it will fortify the remonstrances which have been presented at *London* against the *British* order of *January* 7th. Should it, contrary to expectation, turn out that the *French* decree was meant, and is to operate according to the latitude of its terms, you will of course have made the proper representations, grounded as well on the principles of public law, as on the express stipulations of the convention of 1800. Nothing, besides, could be more preposterous than to blend, with an appeal to neutral rights and neutral nations a gross infraction of the former, and outrage on the sentiments of the latter; unless it be to invite a species of contest on the high seas, in which the adversary has every possible advantage. But on the more probable supposition that the decree will not be unfavourably expounded, it will be still necessary to press on the *French* government a despatch of such orders to their cruisers, in every

quarter, as will prevent a construction of the decree favourable to their licentious cupidity. The moment your letter was received, the answer of the *French* minister of marine to your note was communicated to general *Turreau*, with a call on him to transmit it immediately to the *French* governors in the *West Indies*. This he readily engaged to do. But notwithstanding this precaution, there are proofs that the *West India* privateers have, under colour of the edict, committed depredations which will constitute just claims of redress from their government.

" Mr. *Erving* has forwarded a *Spanish* decree also avowedly pursuing the example and the views of the *French* emperor. The terms of this decree are even more vague, or rather more broad, than those of the prototype; and if not speedily recalled or corrected, will doubtless extend the scene of spoliations already begun in that quarter, and of course thicken the cloud that hangs over the amity of the two nations."

Extract of a Letter from Mr. Madison to General Armstrong.

Department of State, February 8th, 1808.

" Your letters and communications by doctor *Bullus* were duly delivered on the 14th day of *December*. The same conveyance brought a copy of the sentence pronounced by the *French* prize court in the case of the *Horizon*, giving a judicial effect to the decree of *November* 21, 1806, as expounded in the answer of Mr. *Champagny* to your letter of the 12th *November* 1807.

Whilst the *French* government did not avow or enforce a meaning of the decree of *November* 1806, in relation to the *United States*, extending its purview beyond the municipal limits, it could not in strictness be regarded as an infraction either of our neutral or conventional rights; and consequently did not authorize more than a demand of seasonable explanations of its doubtful import, or friendly expostulations with respect to the rigour and suddenness of its innovations.

The case is now essentially changed. A construction of the decree is avowed and executed, which violates as well the positive stipulations of the convention of *September* 30th, 1800, as the incontestable principles of public law; and the president charges you to superadd, to whatever representations you may have previously made, a formal remonstrance in such terms as may be best calculated either to obtain a recal of the illegal measure, so far as it relates to the *United States*, or to have the effect of leaving in full force all the rights accruing to them from a failure to do so.

That the execution of local laws, against foreign nations on the high seas, is a violation of the rights of the former and the freedom of the latter, will probably not be questioned. A contrary principle would in fact imply the same exclusive dominion over the entire ocean as is enjoyed within the limits of the local sovereignty, and a degradation of every other nation from its common rights and equal rank.

If it be contended that the decree, as a retaliation on the other belligerent, at the expense of neutral nations, is justified by a culpable acquiescence in the prior measures of that belligerent, operating through neutrals, you will able to deny such acquiescence, and to urge moreover that, on every supposition, the retaliating measure could not be justly enforced in relation to neutrals, without allowing them at least a reasonable time for choosing between due measures against the prior wrong and an acquiescence in both. The copy of the representations to the *British* government through its minister here, on the subject of its orders of *January* 1807, will at once disprove an acquiescence on the part of the *United States*, and explain the grounds on which the late extension of the *French* decree of *November* 1806, is an object of just remonstrance.

The conduct of the *French* government in giving this extended operation to its decree, and indeed in issuing one with such an apparent or doubtful import against the rights of the sea, is the more extraordinary, inasmuch as the inability to enforce it on that element exhibited the measure in the light of an empty menace; at the same time that it afforded pretexts

to her enemy for severe retaliations; for which ample means are found in her naval superiority.

The accumulated dangers, to which the illegal proceedings of the belligerent nations have subjected the commerce and navigation of the *United States*, have at length induced congress to resort to an embargo on our own vessels, as a measure best fitted for the crisis; being an effectual security for our mercantile property and mariners now at home and daily arriving, and at the same time neither a measure nor just cause of war. Copies of this act were soon after its passage transmitted to Mr. *Pinkney*, with an authority to assure the *British* government that it was to be viewed in this light; and that it was not meant to be the slightest impediment to amicable negotiations with foreign governments. He was requested to avail himself of an opportunity of communicating to you and Mr. *Erving* this view of the subject; and I hope that you will have been thence enabled to present it to the *French* government. Not relying however on that indirect opportunity, I send by this another copy of the act, with an instruction from the president, that you make it the subject of such explanations as will guard against any misconception of the policy which led to it. It is strictly a measure of precaution required by the dangers incident to external commerce; and being indiscriminate in its terms and operation towards all nations, can give no just offence to any. The duration of the act is not fixed by itself; and will consequently depend on a continuance or cessation of its causes in a degree sufficient in the judgment of the legislature to induce or forbid its repeal. It may be hoped that the inconveniences felt from it by the belligerent nations, may lead to a change of the conduct which imposed the inconveniences of it on ourselves. *France* herself will be a sufferer, and some of her allies far more so. It will be very agreeable to find in that consideration, and still more in her sense of justice, a sufficient motive to an early manifestation of the respect due to our commercial rights. The example would be worthy of the professions which she makes to the world on this subject.

" *February* 18th. Since the above was written, I have been under a degree of indisposition which has suspended the proposed continuation of it, and which now will oblige me to be very brief; the more so, as the vessel has been some days detained, which was engaged for the special purpose of conveying public despatches and private letters to *Europe*.

" The delay has enabled me to inform you, that Mr. *Erskine*, a few days ago, communicated by instructions from his government, its late decrees of *November* 11th, and those forming a sequel to them. The communication was accompanied with assurances that much regret was felt by his *Britannic* majesty, at the necessity which the conduct of his enemy had created for measures so embarrassing to neutral commerce; and that his majesty would readily follow an example of relinquishing such a course or even of making relaxations *pari passu* with his enemy.

" Whether these intimations have any reference to the distinction between such parts of the *French* decree as operate municipally on shore, and such as operating on the high seas, violate the rights of neutrals, or to a distinction between the former restriction and the late extension of the decree with respect to the *United States*, Mr. *Erskine* did not seem authorized to say. The probability is, that neither of these distinctions entered into the views of the *British* cabinet. But it is certainly not less the duty than the true policy of the emperor of the *French* so to vary his decree as to make it consistent with the rights of neutrals and the freedom of the seas, and particularly with his positive stipulations to the *United States*. This may be the more reasonably expected, as nothing can be more clear, as has been already observed, than that the effect of the decree, as far as it can be carried into effect, would not be sensibly diminished by abolishing its operation beyond the limits of the territorial sovereignty.

" In remonstrating against the injustice and illegality of the *French* decree, I am aware that you may be reminded of antecedent injuries to *France* and her allies through *British* violations of neutral commerce. The fact cannot be denied,

and may be urged with great force, in our remonstrances against the orders to which *Great Britain* has given a retaliating character; since the *French* decree might on the same ground be pronounced a retaliation on the preceding conduct of *Great Britain*. But ought the legitimate commerce of neutrals to be thus the victim and the sport of belligerents contesting with each other the priority of their destructive innovations; and without leaving, either of them, to neutrals, even the opportunity or the time for disproving that culpable acquiescence which is made the pretext by both for the wrongs done to them? And I must repeat that, apart from all questions of this nature, the *French* decree, or at least the illegal extensions of it to the *United States*, remain chargeable with all the impolicy which has been pointed out.

"I find by accounts from *Hamburg*, *Bremen*, *Holland* and *Leghorn*, that the trade and property of our citizens have been much vexed by regulations subaltern to those of the original decree of *November* 21, 1806. How far the complaints are founded on proceedings violating our public rights, or on such as are unfriendly and inequitable towards our citizens who have placed their property within those jurisdictions, you will be able to decide better than we can do at this distance; and the president refers to your own judgment the kind of representation to the *French* government which those and other analogous cases may require."

Extracts of a letter from Mr. Madison, to General Armstrong.

"Department of State, May 2d, 1808.

"Since my last, of which lieutenant *Lewis* was the bearer, I have received your several letters of 27th *December*, 22d *January*, 15th and 17th *February*, with their respective inclosures.

"That of the 15th *January* from Mr. *Champagny* to you, has, as you will see by the papers herewith sent, produced all the sensations here, which the spirit and style of it were cal-

culated to excite in minds alive to the interests and honour of the nation. To present to the *United States* the alternative of bending to the views of *France* against her enemy, or of incurring a confiscation of all the property of their citizens carried into the *French* prize courts, implied that they were susceptible of impressions by which no independent and honourable nation can be guided; and to prejudge and pronounce for them the effect which the conduct of another nation ought to have on their councils and course of proceeding, had the air, at least, of an assumed authority, not less irritating to the public feelings. In these lights, the president makes it your duty to present to the *French* government the contents of Mr. *Champagny's* letter; taking care, as your discretion will doubtless suggest, that whilst you make that government sensible of the offensive tone employed, you leave the way open for friendly and respectful explanations, if there be a dispostion to offer them; and for a decision here on any reply which may be of a different character.

"Congress closed their session on the 25th ultimo. For a general view of their proceedings, I refer to the series of newspapers heretofore and now forwarded, and to other prints which are added. Among their acts of chief importance, is that which vests in the president an authority to suspend in whole or in part the embargo laws.

"The conditions on which the suspending authority is to be exercised will engage your particular attention. They appeal equally to the justice and the policy of the two great belligerent powers, now emulating each other in violations of both. The president counts on your best endeavours to give to this appeal all the effect possible with the *French* government. Mr. *Pinckney* will be doing the same with that of *Great Britain*. The relation in which a recal of its retaliating decrees by either power, will place the *United States* to the other is obvious; and ought to be a motive to the measure proportioned to the desire which has been manifested by each, to produce collisions between the *United States* and its adver-

sary; and which must be equally felt by each to avoid one with itself.

"Should wiser councils or increasing distresses, induce *Great Britain* to revoke her impolitic orders against neutral commerce, and thereby prepare the way for a removal of the embargo as it applies to her, *France* could not persist in the illegal part of her decrees, if she does not mean to force a contest with the *United States*. On the other hand should she set the example of revocation, *Great Britain* would be obliged, either by following it, to restore to *France* the full benefit of neutral trade which she needs, or by persevering in her obnoxious orders after the pretext for them had ceased, to render collisions with the *United States* inevitable.

"In every point of view, therefore, it is so clearly the sound policy of *France*, to rescind so much at least of her decrees as trespass on neutral rights, and particularly to be the first in taking the retrograde step, that it cannot be unreasonable to expect that it will be immediately taken.

"In whatever degree the *French* government may be led to change its system, you will lose no time in transmitting the information to this department, and to Mr. *Pinckney*, and by hired conveyances, if necessary. A correspondent instruction is given to Mr. *Pinckney*.

"It is of the greater importance that you should receive from each other the earliest notice of any relaxations, as each government is under a pledge to follow such an example by the other. And it is not of less importance that the president or congress should be acquainted with the facts, that the proceedings here may be accommodated to them.

"That you may know the grounds on which the *British* orders of *November* have been arraigned by this government, I inclose a copy of the answer to Mr. *Erskine's* note communicating them; a copy of the note being also inclosed.

"The other documents communicated will put you in full possession of the relations of the *United States* with *Great Britain*, as resulting from the issue of our general negotiations, and from that of the mission of Mr. *Rose*.

"This despatch is forwarded by Mr. *Baker*, who takes his passage from *Baltimore*, in a vessel engaged as was the *Osage*, which sailed from *New York*, for the special purpose of public and mercantile correspondences with *Europe*. She will proceed, in the first instance, to *L'Orient*, where she will leave Mr. *Baker*, and thence proceed with despatches for Mr. *Pinckney* to *Falmouth*, where she will remain a few days to receive communications from him. She will then return to *L'Orient*, in order to bring back Mr. *Baker* with your communications."

Mr. Madison to General Armstrong.

Department of State, July 21, 1808.

SIR,

Herewith you will receive a copy of the papers relating to one of the vessels which were destroyed at sea by the *French* frigates returning from the *West Indies*. I observe that in your letter to *M. Champagny*, of the 2d of *April*, you have incidentally noticed this occurrence. If ample reparation should not have been made to the sufferers, the president thinks it proper, that as their cases become authenticated, you should present them in terms which may awaken the *French* government to the nature of the injury and the demands of justice. The burning of neutral vessels detained on the high seas is the most distressing of all the modes by which belligerents exert force contrary to right; and in proportion as it is destitute of apology, ought at least to be the promptitude and amplitude of the redress. If it be contended that the destruction in these cases proceeded solely from the danger that, otherwise, intelligence might reach a pursuing or hovering force, it may be answered, that if such a plea were of greater avail, it would only disprove a hostility of intention, without diminishing the obligation to indemnify, on the most liberal scale, the injured individuals. It may be added, that if the outrage on the individuals was not meant as a hostility towards their

nation, the latter might justly expect a tender of such explanations as would leave no doubt on this subject.

I have the honour to be, &c.

(Signed) JAMES MADISON.

General Armstrong,
Minister Plenipotentiary of the *United States*, *Paris*.

Extract of a letter from Mr. Madison to General Armstrong.

Department of State, July 22d, 1808.

"Your despatches by lieutenant *Lewis* were delivered on the 8th instant.

"It is regretted that the interval between his arrival and the date of your letter to Mr. *Champagny*, during which I presume some verbal intercommunication must have taken place, had produced no indication of a favourable change in the views of the *French* government with respect to its decrees; and still more that instead of an early and favourable answer to your letter, it should have been followed by such a decree as is reported to have been issued on the 22d *April*, at *Bayonne*. The decree has not yet reached the *United States*, and therefore its precise import cannot be ascertained. But if it should be, as it is represented, a sweeping stroke at all *American* vessels on the high seas, it will not only extend our demands of reparation, but is rendered the more ominous with respect to the temper and views of the emperor towards the *United States* by the date of the measure.

"The arrival of Mr. *Baker* with my letter of *May* 2d, of which a copy is herewith sent, will have enabled you to resume the subject of the decrees with the fairest opportunity that could be given to the *French* government for a change of the unjust and unwise course which has been pursued; and I assure myself that you will not have failed to turn the communications with which you are furnished to the best account. If *France* does not wish to throw the *United States* into the war against her, for which it is impossible to find a rational or plausible inducement, she ought not to hesitate a moment, in revoking at least

so much of her decrees as violate the rights of the sea, and furnish to her adversary the pretext for his retaliating measures. It would seem as if the imperial cabinet had never paid sufficient attention to the smallness of the sacrifice which a repeal of that portion of its system would involve; if an act of justice is to be called a sacrifice.

"The information by the return of the *Osage* from *England* is not more satisfactory than that from *France*. Nothing was said on the subject of the *Chesapeake*, nor any thing done or promised as to the orders in council. It is probable that further accounts from the *United States* were waited for; and that the arrival of the *St. Michael* will have led to a manifestation of the real views of that government on those and other subjects. In the meantime it cannot be doubted that hopes were cherished there of some events in this country favourable to the policy of the orders; and particularly that the offensive language and proceedings of *France* would bring on a hostile resistance from the *United States;* in which case the *British* government would be able to mould every thing to its satisfaction. There is much reason to believe that if the *British* government should not concur in a mutual abolition of the orders and of the embargo, it will result from an unwillingness to set an example which might be followed and might consequently put an end to the irritating career of her enemy, on which the calculation is built. Might not use be made of this view of the matter in those frank and friendly conversations which sometimes best admit topics of a delicate nature, and in which pride and prejudice can be best managed, without descending from the necessary level? In every view it is evidently proper, as far as respect to the national honour will allow, to avoid a style of procedure which might cooperate with the policy of the *British* government, by stimulating the passions of the *French*."

Copies and extracts of letters from General Armstrong to the Secretary of State.

(DUPLICATE.)

General Armstrong to Mr. Madison.

Paris, November 12, 1807.

SIR,

IT was not till yesterday, that I received from Mr. *Skipwith* a copy of the decree of the council of prizes in the case of the *Horizon*. This is the first unfriendly decision of that body under the arrêté of the 21st of *November*, 1806. In this case, and on the petition of the defendant, the *court* has recommended the restitution of the *whole* cargo. I did not however think proper to join in asking as a favour, what I believed myself entitled to as a right. I subjoin a copy of my note to the minister of foreign affairs, and am sir,

Your most obedient,
and very humble servant,
(Signed) JOHN ARMSTRONG.

Note of general Armstrong.—"In the former copy nearly a page of this letter was omitted by the copier."

The same to M. Champagny.

Paris, November 12, 1807.

SIR,

The document to which these observations are prefixed will inform your excellency, that an *American* ship, trading under the protection of the laws of nations, and of particular treaties, and suffering shipwreck on the coast of France, has recently been seized by his majesty's officers, and adjudged by his council of prizes as follows, viz.

"Our council puts at liberty the *American* vessel the *Horizon*, shipwrecked the 30th of *May* last, near *Morlaix*, and consequently orders that the amount arising from the sale legally made of the wreck of the said vessel, together with the mer-

chandise of the cargo, which, according to an estimate made in presence of the overseers of the administrations of the marine and customhouse, shall have been acknowleged not to proceed from *English* manufactures, nor from *English* territory, shall be restored to captain *Mac Clure*, without deducting any other expenses than those relative to the sale; and with regard to the other merchandise of the cargo, which, from the result of the said estimate, shall be acknowledged to come from *English* manufactures, or *English* territory, by virtue of the 5th article of the decree of the 21st of *November*, 1806, it shall be confiscated for the use of the state: the whole to be sold by the forms prescribed in the regulations, and the application of the product to be made in conformity to the arrangements of the said decree; deduction being made for the expense of saving the goods, and that of the support of the crew, until the day that the captain shall receive the notification of the present decision."

The reasons upon which this decision is founded are at once so new and so alarming to the present friendly relations of the two powers, that I cannot but discuss them with a freedom, in some degree proportioned to my sense of their novelty and importance.

" Considering," says the council,

" 1st. That the neutrality of the ship and cargo were sufficiently established, the whole ought to be restored (agreeably to the provisions of the convention of the 30th of *September* 1800) provided no merchandise of *English* origin had been found in her; and, of course, that she had not been brought within the limits of the imperial decree of the 21st of *November*, 1806."

Here is an open and unqualified admission, that the ship was found within the rules prescribed by the convention of 1800; that, according to these rules, her cargo and herself ought to have been restored; and that such would have been the fact, but for the operation of the decree of the 21st of *November*, 1806.

In the letter your excellency did me the honour to write to me on the 7th of *October* last, you thought it "easy to reconcile the obligations of this decree with the preservation of those arising from treaties." It was not for me to examine the means by which this reconciliation was to be effected. They no doubt fully existed, and yet exist, in his majesty's good pleasure; and taking for granted this fact, I saw in the opinion nothing but proofs of friendly dispositions, and pledges that these were not to be either wantonly destroyed or diminished. How inauspicious, however to its authority and the consolations derived from it, is this recent act of the council of prizes? an act which explicitly acknowledges the opposite characters and conflicting injunctions of these two instruments; and which of course draws after it considerations the most serious to the government of the *United States*.

The second reason of the council is,

"That the decree declaring (*British*) merchandise good prize, had principally in view captures made on the high seas; but that the question, whether shipwrecked goods ought to be restored or confiscated, having always been judged under the 14th article of the regulation of the 26th of *July*, 1778, and according to their character (which might have rendered lawful, or have even commanded, their seizure at sea) there is no room to introduce in this case any new distinction, which, however philanthropic it may appear, has not as yet been adopted as a rule by any maritime nation."

The doctrine resisted in this passage, and which inculcates the duty of extending protection to the unfortunate, is not new to his majesty's council of prizes. They have themselves consecrated it by their decision of the 5th of *March*, 1800. By that decision they restored an enemy's ship (the *Diana*) on the *single reason*, that she had been "*compelled to enter a French port by stress of weather*." "I should equally fail," says the attorney general, "in respect to myself, and to the council before whom I have the honour to represent the government, *were I not to maintain a principle, consecrated by our laws, and by those of all nations*. In all circumstances, let the loyalty of

the *French* government serve as the basis of your decisions. Prove yourselves at once generous and just; your enemies will know, and respect your magnanimity." Such was the principle adopted by the council in the year 1800, and in the case of an enemy's ship; yet, we are now told, that this very principle, so honourable to the court, to the nation, and to human nature, is utterly unknown to all maritime people; and on what occasion do we hear this? when an enemy's ship is again thrown on the *French* coast? No: it has been reserved for the wreck of a neutral and friendly vessel! for a ship of the *United States!* It is not denied, that had this ship escaped the rocks and made the port of *Morlaix*, the only inhospitality to which she would have been exposed (under the most rigorous interpretation of the law in question) would have been that of being ordered again to sea. Has then the misfortune of shipwreck so far altered her condition, as to expose her to the injury of confiscation also? and is this among the principles which the defender of maritime rights means to consecrate by his power and his wisdom? It is impossible.

The third reason of the council is, "that the application of the 5th article aforesaid, in as far as it concerns the *American* and other nations, is the result both of the general expressions of that very article, and of the communication recently made by his excellency, the grand judge, concerning the primitive intention of the sovereign."

This reason will be found to be substantially answered in my reply to reason No. 5, of the council. It will be seen that the opinion given here, that "the application of article 5, of the imperial decree to *American* commerce, is the result of the general expressions of that very article," was not the opinion of the council on the 5th of *March* last, when they judged the case of the *Hibernia;* they then declared, in *totidem verbis*, that the decree "said nothing of its own influence on the convention of 1800," between the *United States* and *France*.

The fourth reason of the council is, "that the expedition in question having certainly been made with full knowledge of the said decree, no objection can be drawn, with any propriety,

from the general rules forbidding a retrospective action, nor even, in this particular case, from the posterior date of the act in which the sovereign decides the question, since that act sprung from his supreme wisdom, not as an interpretation of a doubtful point, but as a declaration of an anterior and positive disposition."

A distinction is here attempted to be taken between the interpretation of a doubtful point, and the declaration of an anterior and positive rule. This distinction cannot be maintained; for if the rule had been positive, there would have been no occasion for the declaration. Neither the minister of marine, nor the council of prizes, could have had any doubts on the subject. The execution of the decree would have been prompt and peremptory; nor would a *second act* on the part of his majesty, after the lapse of twelve months, have been necessary to give operation to the *first*. Need I appeal to your excellency's memory for the facts on which these remarks turn? You know that doubts did exist. You know that there was, under them, *much hesitation* in pronouncing. You know, that as late as the 9th of *August*, I sought an explanation of the decree in question; and that even then, your excellency (who were surely a competent and legitimate organ of his majesty) did not think yourself prepared to give it. The conclusion is inevitable: his majesty's answer, transmitted to the court of prizes on the 18th of *September* last, through the medium of the grand judge, was in the nature of an *interpretation*, and being so, could not, without possessing a retroactive quality, apply to events many months anterior in date to itself.

The fifth reason of the council, and the last which enters into my present view of the subject, is, " that though one of the principal agents of his majesty had given a contrary opinion, *of which the council had at no period partaken:* this opinion being that of *an individual*, could not, (whatever consideration its author may merit) balance the formal declaration given in the name of his majesty himself; and that, if the communication of this opinion had, as is alleged, given room to, and served as a basis for many *American* shipments, and

particularly of the one in question, this circumstance, which may call for the indulgence of his majesty, in a case in which the confiscation is entirely to the advantage of the state, does not prevent a council, rigid in its duty, to pronounce in conformity to the decree of the 21st of *November*, and of the declaration which followed it."

It would appear from this paragraph, that, not finding it easy to untie the knot, the council had determined to cut it. Pressed by the fact, that an interpretation of the decree had been given by a minister of his majesty, specially charged with its execution, they would now escape from this fact, and from the conclusions to which it evidently leads, by alleging,

1st. That at no time had the council partaken of the opinion given by the minister: and

2d. That this opinion, being that of *an individual*, could not possess either the force or authority of one truly ministerial.

It appears to me, as I think it will appear to your excellency, that the council have, in these statements, been less correct than is usual to them on similar occasions. If, as they now assert, they have never partaken of the minister's opinion; if they have never even hesitated on the question, whether the decree of *November* did, or did not, derogate from the treaty of 1800; why, I ask, suspend the *American* cases generally? or, why decide as they did in the case of the *Hibernia?* If I mistake not, we find in this case, the recognition of the very principle laid down by the minister of marine. That officer says: "In my opinion, the *November* decree does not work any change in the rules at present observed, with respect to neutral commerce, and consequently none in the convention of the 8th *Vendemaire*, year 9:" And what says the council? "*Admitting* that this part of the cargo (the rum and ginger) was of *British origin*, the dispositions of the *November* decree *(which contain nothing with regard to their own influence over the convention of the 8th Vendemaire, year 9)* evidently cannot be applied to a ship leaving *America* on the 6th of the same month of *November;* and, of course, cannot have authorized her capture, in the moment she was entering the neutral port of her destination." We have here, three dis-

tinct grounds of exemption from the effects of the *November* decree.

1st. The *entire silence* of that decree, with regard to its own influence over the convention of 1800.

2d. The *early period* at which the ship left the *United States;* and

3d. The *neutral character* of the port to which she was destined.

If such, sir, were the principles admitted by the council on the 25th of *March* last, with what correctness can it be now said, " that at no period have they partaken of the opinion of the minister?"

The second fact asserted by the council is, that the interpretation of the decree in question, given on the 24th of *December*, 1806, was *private*, not *public;* or, in other words, that it was the interpretation of the *man*, not that of the *minister;* and as such, cannot outweigh the more recent declaration coming directly from his majesty himself.

On the comparative weight of these declarations, I shall say nothing; nor shall I do more to repel the first part of the insinuation *(that the minister's declaration was that only of the individual)* than to submit to your excellency, my letter of the 20th of *December*, 1806, claiming from that minister an *official* interpretation of the decree in question, and his answer of the 24th of the same month, giving to me the interpretation demanded.

To your excellency who, as late as the 21st of *August* last considered the minister of marine as the natural organ of his majesty's will in whatever regarded the decree aforesaid, and who actually applied to him for information relating to it, this allegation of the council of prizes and the reasoning founded upon it cannot but appear very extraordinary, and will justify me in requesting that his majesty may be moved to set aside the decision in question, on the ground of error in the opinion of the council.

If, in support of this conclusion, I have drawn no arguments from the treaty of 1800, nor from the laws of nations, your excellency will not be at a loss to assign to this omission its

true cause. It would surely have been a useless formality to appeal to authorities, not only practically, but even professedly extinct. In the letter of the minister of justice, of the 18th of *September*, we are told by his majesty himself, that "since *he* had not judged proper to make any exception in the letter of his decree, there was no room to make any in its execution." And in the report of your excellency's predecessor, of the 20th of *November*, 1806, we have these memorable words:

"*England* has declared those places blockaded, before which she had not a single ship of war.

"She has done more; for she has declared, in a state of blockade, places which all her assembled forces were incapable of blockading: immense coasts and a vast empire.

"Afterwards, drawing from a chimerical right, and from an assumed fact, the consequence that she might justly make her prey, of every thing going to the places laid under interdiction, by a simple declaration of the *British* admiralty, and of every thing arising therefrom, and carrying this doctrine into effect, she has alarmed neutral navigators and driven them to a distance from ports whither their interests attracted them, and which the law of nations authorized them to frequent.

"Thus it is, that she has turned to her own profit, and to the detriment of *Europe*, but more particularly of *France*, the audacity with which she mocks at *all rights, and insults even reason itself.*

"Against a power which forgets to such a pitch all ideas of justice and all humane sentiments, *what can be done, but to forget them for an instant one's self?*"

Words cannot go further to show the extinguished authority, in the one case, of the treaty subsisting between the *United States* and his imperial majesty, and, in the other, of the law of nations. To appeal to them, therefore, would be literally appealing to the dead.

Accept, sir, &c. &c. &c.

(Signed) JOHN ARMSTRONG.

To his Excellency the Minister
of Foreign Relations.

General Armstrong to Mr. Madison.

Paris, 1st December, 1807.

SIR,

I have this moment received a letter from his majesty's minister of foreign relations, of which I subjoin a copy, and am sir,

With very high consideration, your most obedient, and very humble servant,

(Signed) JOHN ARMSTRONG.

M. Champagny to General Armstrong.

(TRANSLATION.)

Milan, 24th November, 1807.

SIR,

The execution of the measures taken against the *English* commerce has frequently caused reclamations on your part. The intention of his majesty, without doubt, is, that every particular abuse may be repressed; but the federal government cannot make any complaint against the measures themselves; and while the *United States* allow that their vessels may be visited by *England*, that she may drag them into her ports and turn them from their destination; while they do not oblige *England* to respect their flag and the merchandise which it covers; while they permit that power to apply to them the absurd rules of blockade which it has set up with the view of injuring *France;* they bind themselves by that tolerance towards *England* to allow also the application of the measures of reprisals which *France* is obliged to employ against her. His majesty regrets, without doubt, to have been forced to recur to such measures. He knows all that the commercial classes may have to suffer in consequence of them, particularly those, who, having habitual relations with *England*, using a common language, and often mixing their interests, might more frequently occasion an apprehension of some commercial connivance with the *English*, inasmuch as they would have greater

facilities in covering it. This circumstance made it necessary to use towards them precautions more exact, and an unceasing watchfulness, in order not to be exposed to abuses, which might result from a less constant vigilance. But it is not to *France*, it is to *England* that these inconveniences to individuals ought to be imputed. She it is who has given the example of measures unjust, illegal and infringing on the sovereignty of nations. To oblige her to renounce them, it has become necessary to combat her with her own arms. In violating the rights of all nations, she has united them all by a common interest; and it is for them to have recourse to force against her: to forbid her the search (la visite) of their vessels; the taking away of their crews; and to declare themselves against measures which wound their dignity and their independence. The unjust pretensions of *England* will be kept up as long as those, whose rights she violates, are silent; and what government has had more to complain of against her than the *United States?* All the difficulties which have given rise to your reclamations, sir, would be removed with ease, if the government of the *United States*, after complaining in vain of the injustice and violations of *England*, took with the whole continent the part of guaranteeing itself therefrom. *England* has introduced into the maritime war an entire disregard for the rights of nations. It is only in forcing her to a peace that it is possible to recover them. On this point the interest of all nations is the same. All have their honour and their independence to defend.

Accept, sir, &c. &c. &c.

(Signed) CHAMPAGNY.

Extract from a letter of General Armstrong to Mr. Madison.

Paris, 17th February, 1808.

"Inclosed is a copy of the answer from the minister of marine to my letter of the 13th instant, in relation to the sale of a part of the cargo of the ship *James Adams*. It would now appear, that the promises of forbearance made by another department are applicable only to vessels sequestered in the ports, and not to such as have been captured at sea."

[5th division of prizes.]

Extract from a letter of the Minister of Marine to General Armstrong.

Paris, 15th February, 1808.

(TRANSLATION.)

"I observe to you moreover that the question now is not as to a vessel sequestered in port; but as to a prize made at sea, and seized for a contravention of the decree of the 17th of *December* last; that the provisional sale ordered on account of the "average" is for the interest as well of the captured, as of the captors; and it is directed according to the case provided for by the regulation of the 2d *Prairéal*, 11th year."

(EXTRACT.)

General Armstrong to Mr. Madison.

Paris, 5th April, 1808.

"I received the despatches you did me the honour to address to me by Mr. *Lewis*, on the 26th ultimo.

"Though I had complained often and earnestly of both the principles and operation of the emperor's decrees of *November* 1806, and *December* 1807; (having written at least twenty notes on the different cases which have arisen under them) yet, as the president's orders were express, that on receipt of your letter I should superadd, to whatever representations might have been previously made, a formal remonstrance against those decrees, I did not lose a moment in writing and presenting the inclosed note; the terms of which will, I hope, appear to be such as were proper or necessary to the case, and calculated, either to obtain a recal of the illegal measures, or to leave in full force the rights accruing to the *United States* from a failure on the part of *France* to recal them. To this note I have not yet received an answer, nor have I reason to expect one soon, as the emperor has left *Paris* (it is said for *Spain*) and had, at no time before he set out, indicated any alteration in the views which originally produced the decrees in question.

"Mr. *Pinkney* found means (in the return to the continent of *M. d'Alopeus*) to communicate the president's views on the subject of the general embargo, and particularly the desire he had, that it should not be considered as a measure of hostility against any foreign nation. Some explanations of this kind were perhaps necessary in *England*, where, from the misrepresentations of our own people, the character of the policy was likely to be misunderstood; but as neither the same nor any other reason existed for making them here, none have been offered."

General Armstrong to M. Champagny.

Paris, April 2d, 1808.

SIR,

Having submitted, to the government of the *United States*, copies of the imperial decrees of the 21st of *November* 1806, and 17th of *December* 1807, and of the expositions which your excellency has been pleased at different times to give of them, I have recently received the instructions of the president to remonstrate against both the provisions and the operation of the said decrees, on the ground of their infracting, as well the positive stipulations of a particular treaty, as the incontestable principles of public law.

In discharging this duty, your excellency will permit me to recal to your remembrance the twelfth and fourteenth articles of the treaty made between the *United States* and *France*, on the 30th of *September* 1800. These articles provide,

1st. That "it shall be lawful for the citizens of either country to sail with their ships and merchandise (contraband goods always excepted) from any port whatever, to any port of the enemy of the other, and to sail and trade with their ships and merchandise, with perfect security and liberty, from the countries, ports and places of those who are enemies of both, or of either party, without any opposition or disturbance whatsoever; and to pass not only directly from the places and ports of the enemy aforesaid to neutral ports and places, but also from one place belonging to an enemy to another place belonging to an

enemy, whether they be or be not under the jurisdiction of the same power, unless such ports or places shall be actually blockaded, besieged or invested."

2d. That "vessels sailing for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, may be turned away from such port or place; but they shall not be detained, nor any part of their cargo (not contraband) confiscated, unless, after notice of such blockade or investment, they shall again attempt to enter; but they shall be permitted to go to any other port or place they shall think proper."

3d. That "free ships shall give a freedom to goods; and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the citizens of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either: contraband goods being always excepted."

These stipulations are not more clear in themselves, nor of more indisputable application and authority in the present case, than the injunctions of public law, by which they are enforced, viz. that local regulations (excepting by virtue of convention) cannot apply to foreign nations on the high seas, without violating the rights of the one, and the freedom of the other; that blockades can only exist, when places are so invested that no serious attempts can be made to approach them without exposing the parties making them to imminent danger; that merchant vessels may be visited without any degradation to the flag of the nation to which they belong, &c. &c. &c. But why multiply proofs of a position which is not denied? Does not the official report of your enlightened predecessor, of the 21st *November* 1806, admit the illegitimacy of the original decree? Does it not expressly say, that the doctrines of blockade introduced by *England* are monstrous and indefensible? and that the practice, like the doctrine, is a mockery of right, and an insult upon reason? After strictures so severe, because so just, what can be said for the policy of *France*, which differs in nothing from that of *England*? Has your excellency attempted

to defend either the theory or the practice of this policy, on the ground of its conformity to the principles of public law? Or have you done more at any time, or on any occasion than to seek a justification for it on the bare suggestion, that the *United States* have acquiesced in the measures of *England?* And how has even this suggestion been maintained? By an exposition of the wrongs inflicted on *American* commerce! and which have been notoriously practised by all the belligerents in turn. Have not the ships of the *United States* been encountered by all? Have they not been turned from their original destination? Have they not been dragged into foreign ports for adjudication? Have they not in several instances been burnt on the high seas? Is not the argument, founded on this state of things, equally good for either, or for all the belligerents? And can *France* derive from it rights which do not equally accrue to her enemies? There is, however, another and a better answer to this suggestion, which your excellency has already seen in the letter I had the honour of writing to you on the 16th of *February* last, viz. that the suggestion is neither well nor plausibly founded; and that the *United States* neither have submitted, nor will submit, to the usurpations of *Great Britain*, nor to those of any other nation.

Accept, sir, &c.

(Signed) JOHN ARMSTRONG.

His Excellency, the Minister
of Foreign Relations.

Extract of a letter from General Armstrong, to Mr. Madison.

Prais, April 12th, 1808.

"I have detained Mr. *Lewis* till to day, on the supposition that my letter of the 2d instant to M. *de Champagny* would be answered. This was, however, a mere accommodation to forms; since the absence of the emperor and that of the minister of foreign relations, rendered this supposition highly improbable. There being then no public reason for Mr. *Lewis's* longer stay in *Paris*, and the permission to the

Osage to prosecute her voyage to *England* not including one to return to *France*, I have thought it best that he should embark with such despatches as were ready, proceed to *Falmouth*, in *England*, and thence, after receiving Mr. *Pinkney's* orders, return with all possible expedition to the *United States*. He has accordingly been instructed to this effect."

Extracts of a letter from the same to the same, dated

Paris June, 25, 1808.

"The *St. Michael* arrived at *L'Orient* on the 1st instant, and, like the *Osage*, was immediately put under sequestration. It was not till the 8th, that r. *Baker* arrived here.

"The remonstrance ordered, with respect to the terms of Mr. *Champagny's* letter of the 15th *January*, shall be executed the moment the prince of *Benevent* returns from *Valençay;* and I hope in a way, which, while it makes the *French* government sensible of the offensiveness of those terms, will not obstruct the road to friendly and respectful explanations on its part.

"To give this a chance of finding Mr. *Livingston* at *Bordeaux*, I must close it here."

The same to the same.

Paris, 18th July, 1808.

SIR,

I avail myself of the detention of the *Arcturus*, to transmit copies of two letters which I have written to M. *de Champagny:* the one, in execution of the president's orders with regard to the offensive terms employed by that minister in his note of the 15th of *January* last; the other, demanding from him, on the part of his government, an avowal or disavowal of the conduct of rear-admiral *Baudin*, in burning, or

otherwise destroying, on the high seas, four *American* ships and their cargoes.

I have the honour to be, sir,

With very high consideration,

Your most obedient, and very humble servant,

(Signed) JOHN ARMSTRONG.

Secretary of State.

Extract of a letter from General Armstrong, to Mr. Champagny, dated

Paris, July 4, 1808.

" It has been made the duty of the undersigned to bring to the view of the *French* government an official note, addressed to him on the 15th of *January* last, by his majesty's minister of exterior relations, and which, in the opinion of the president is calculated to derogate from the rights of the *United States*, as an independent nation. The note is in the following words, viz. [See Mr. *Champagny's* letter of the 15th *January*, 1808.]

On this note, the undersigned would remark, 1st. That the *United States* have a right to elect their own policy with regard to *England*, as they have with regard to *France;* and that it is only while they continue to exercise this right, without suffering any degree of restraint from either power, that they can maintain the independent relation in which they stand to both: whence it follows, that to have pronounced, in the peremptory tone of the preceding note, the effects which the measures of the *British* government ought to have produced on their councils and conduct, was a language less adapted to accomplish its own object, than to offend against the respect due from one independent nation to another: and

2dly. That the alternative to be found in the last paragraph, and which leaves the *United States* to choose between an acquiescence in the views of *France* against *Great Britain*, and a confiscation of all *American* property sequestered by

order of H. I. M. is equally offensive to both governments: To *France*, as it would impute to her a proposition founded in wrong to individuals; and to the *United States*, as it would imply, on their part, a subjection to pecuniary interests totally inconsistent with their principles, and highly dishonourable to their character.

His excellency will be persuaded that the president, in directing the undersigned to make this representation, had no object in view beyond that of seeking an explanation, which cannot but tend to promote the harmony of the two powers."

General Armstrong to M. Champagny.

Paris, July 10, 1808.

SIR,

Your excellency will see by the inclosed extracts from two letters which his majesty's minister of marine has done me the honour to address to me on the 18th of *April* and 13th of *June* last, that the property taken from the four *American* ships, destroyed by rear admiral *Baudin*, has been placed under the jurisdiction of the imperial council of prizes, to be judged by it, as a case of ordinary capture.

To your excellency, it will be unnecessary to remark, that whatever may be the decision of this council in relation to the merchandise which has been *saved*, the case presents a question of much higher import, and entirely beyond the jurisdiction of a maritime court, viz. the kind and degree of reparation which shall be due for the ships and merchandise which have been *destroyed?* And by way of opening this subject, your excellency will permit me to ask, whether his majesty's government does or does not justify the conduct of rear admiral *Baudin*, in burning or otherwise destroying, on the high seas, the ships and merchandise of a neutral and friendly power.

I pray your excellency, &c.

(Signed) JOHN ARMSTRONG.

M. Champagny.

Extract of a letter from General Armstrong to the Secretary of State, dated

Paris, July 26, 1808.

"It would have given me the highest pleasure to have drawn from this government such explanations, on the general subject of our differences with them, as would have met the friendly and equitable views of the *United States;* but I owe it, as well to you as to myself, to declare that every attempt for that purpose, hitherto made, has failed, and under circumstances, which by no means indicate any change in their respect for the better."

Extracts of a letter from the same to the same, dated

Paris, August 7, 1808.

"I wrote a few lines to you yesterday. Two weeks have gone by without any new condemnation. My remonstrances continue to be unanswered."

"P. S. I inclose a copy of my note of yesterday to M. *de Champagny.*"

Extract of a letter from General Armstrong to M. Champagny, dated

Paris, August 6, 1808.

"Mr. *Armstrong* presents his compliments to M. *de Champagny*, and begs leave to inform him, that having for some months past made trial of the artificial waters of *Tivoli*, without any useful effect, his physician has prescribed for him those of *Bourbon d'Archambault.* Should M. *de Champagny* have any communications to make to Mr. *Armstrong*, he will be pleased to address them as usual to the hôtel de légation *Américaine*, Rue Vanguard, No. 100, whence they will be regularly and promptly transmitted to *Bourbon.*

On leaving *Paris*, Mr. *Armstrong* thinks proper to state his regrets, that the political relations of the two powers should

continue to wear an aspect less auspicious to their future good understanding, than is wished for by those who are the friends of both.

That his majesty has a right to make such municipal regulations as he may deem proper with regard to foreign commerce, neither is, nor has been denied: for example, he may forbid the entry into the ports of *France* of *American* ships which have touched in *England*, or been destined to *England;* and he may either sequester or confiscate such vessels of the *United States* as shall infract these laws, after due promulgation and notice thereof; but beyond this the *United States* hope and believe that his majesty will not go.

M. *de Champagny* will not fail to seize the distinction which these remarks present, between the authority of municipal regulations, and that of public law, and will decide whether it does or does not offer a ground on which the good understanding, so long and so usefully maintained between the *United States* and *France*, may be preserved, and a degree of intercourse between them revived, which shall have the effect of reanimating their former industry.

Does his majesty fear, that the balance of trade, arising from this renewed industry, would go to the advantage of *England?* Means are certainly not wanting to prevent this consequence. Would it not be entirely avoided by making it a condition of the commerce in question, that all ships leaving *France* shall take (in some article or articles of her produce or manufacture) the full amount of the cargoes they bring hither?

Ships, sailing under this regulation, would, or would not, go voluntarily to *England.* If they went voluntarily, it would only be, because that country afforded the best markets for the productions of *France;* in which case the habitual results would be entirely changed; and *England*, ceasing to receive a balance for her manufactures, would begin to pay one to the *United States* on the productions of *France.* Could *France* wish a state of commerce more prosperous than this?

If, on the other hand, the *American* ships did not go voluntarily to *England*, but were captured and sent in for adjudication, it may be fairly presumed, that the *United States* could no longer hesitate about becoming a party to the war against *England*.

Thus, in either case, the interests of his majesty would be directly advanced by the measure: in the one, the wants of *France* and her colonies would be not only regularly supplied, but she would herself become an entrepot for the supply of the continent; in the other, the wishes of his majesty, as expressed in *February* last, would be directly promoted.

Mr. *Armstrong* has the honour of renewing, to M. *de Champagny*, the assurances of his very high consideration."

Extract of a letter from the Same, to the Secretary of State, dated

"Bourbon l'Archambault, August 28, 1808.

"Since my arrival at this place I have been honoured by the receipt of your despatch of the 21st ult. and would immediately return to *Paris*, to renew my discussions with M. *de Champagny*, either personally, as you suggest, or by writing, had I not the most solemn conviction, that any new experiment, made at the present moment, in either form, and of official character, would certainly be useless and probably injurious."

(To be continued.)

REVIEW.

ARTICLE I.

Sugden on the Law of Vendors and Purchasers of Estates.

A Practical Treatise of the law of Vendors and Purchasers of Estates, by *Edward Burtenshaw Sugden*, of *Lincoln's Inn;* first *American* from the second *London* edition. *William P. Farrand and Co. Philadelphia.*

WE do not recollect to have encountered this gentleman before in the ranks of literature. But whether he appears as a *novus hospes* or a veteran we can assure him of a cordial reception. The present time, which may very properly be styled the age of quackery, has produced little of a juridical nature besides digests, abridgments and republications of some of "the wise masters of the law." Mr. *Sugden* has honourably distinguished himself from this class of humble pioneers. The subject which he has undertaken to discuss has never been so amply nor so ably treated. He does not content himself with transcribing the titles and marginal notes of cases; but he boldly investigates the original principles upon which they were decided; and his inductions are therefore clear and, in general, indisputable. The style of this work is perspicuous and nervous; but it has none of those softer graces which captivate the attention and relieve the aridity of a practical treatise.

As a specimen of his manner, we shall quote the introductory chapter, being one which appears the most generally interesting.

"Moral writers insist, that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality.

"If a person enter into a contract, with full knowledge of all defects in the estate, no question can arise: *scientia enim utrinque par pares facit contrahentes.*

"So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems, that the purchaser must take the estate with all its faults; and cannot claim any compensation for them.

"And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

"The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is, what the civilians term, a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

"In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously conceal a *patent* defect, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against the purchaser for breach of contract.

"And if a vendor know of a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, he is bound to disclose it, although the estate be sold, expressly subject to all its faults.

"By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent, however, the inconveniences which would have inevitably resulted from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

"The rule of the civil law also was, "*simplex commendatio non obligat.*" If the seller merely made use of those expressions, which are usual to sellers, who praise at random the goods they are desirous to sell; the buyer, who ought not to have relied upon such vague expressions, could not procure the sale to be dissolved upon any such pretext.

" The same rule prevails in our law, and has received a very lax construction in favour of vendors. It has been decided, that no relief lies against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it, and was deceived in the value.

" Neither can a purchaser obtain any relief against a vendor for false affirmation of value; it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ.

" But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was; and the purchaser act upon such misrepresentation, the vendor cannot, at least in equity, compel execution of the contract.

" And a remedy will lie against the vendor, for false affirmation of rent; because that is a circumstance within his own knowledge. And the purchaser is not bound to inquire further: for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. In *Lysney* v. *Selby*, lord C. J. *Holt* said, that where the vendee does not depend upon the affirmation of the vendor, but sends to inquire into the value of the houses, what they let for, &c. there it is not reasonable he should recover against the vendor. The court, however, took time to consider and look into the record of *Ekins* and *Tresham's* case; and after long considering, and upon view of that record, a judgment which had been given in favour of *Lysney* the purchaser, was affirmed, although, according to the statement of the chief justice, the purchaser did not depend on the vendor's assertion, but did inquire what the estate let for. It appears, therefore, that a purchaser can recover against a vendor for false affirmation of rent, although he did not depend upon the statement; but where it can be satisfactorily proved, that the purchaser did not rely upon the vendor's assertion, a jury would undoubtedly give very trifling damages.

It seems that the same remedy will lie against a person *not interested in the property*, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate; but the statement must be made *fraudulently*, that is, with an intention to deceive; whether it be to favour the owner, or from an expectation of advantage to the party

himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial.

" And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false: Secondly, that the person making the representation, had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and therefore, it is no excuse in the party, who made the representation, to say, that though he had received information of the fact, he did not, at that time, recollect it.

" The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself.

" Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering: and lord *Hardwicke* laid it down, that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in *equity:* to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor.

" The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can, however, seldom happen, that the attorney or agent of the purchaser, is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts, and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate which can only be sustained in equity, and which will not bind a purchaser who obtains the legal estate; unless he had notice of them previously to completing his purchase. Now notice to an agent, although one concerned for both parties, is treated in equity, as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incum-

brance, the purchaser will be bound by it, although he himself was not aware of its existence.

" And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet if the attorney know of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser.

" Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent. In one case a purchaser lost an estate, for which he gave nearly 8000*l.* merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

" On the other hand, the same person being employed on both sides, may, in some cases, be detrimental to the vendor. For instance, if an annuity be sold and a defective security given for it, the circumstance of only one person having been employed, would be a sufficient ground to direct an inquiry into the circumstances, and, if any fraud were proved, equity would relieve the purchaser.

" With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore, if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy.

" To sum up the foregoing observations, a purchaser will be entitled to relief, on account of any *latent* defects in the estate, or the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware.

" In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor, or his agents; he will employ an agent and attorney, not concerned for the vendor; and will have the title to the estate inspected by counsel.

" With respect to incumbrances, it remains to remark, that if a purchaser suspect any person has a claim on the estate he has contracted to buy, he should, before proper witnesses, inquire the fact of him, *at the same time stating that he intends to purchase the estate;* and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser.

" Where difficulties arise in making out a good title, the purchaser should not take possession of the estate, until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in most cases, be deemed an acceptance of the title.

" If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may venture to do so; provided the vendor will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waiver of the objections to the title.

" And a purchaser may safely take possession of the estate, at the time the contract is entered into, as he cannot be held to have waived objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent for the estate, unless the occupation of it has been beneficial to him.

" A purchaser of any equitable right of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation to the purchaser, equity would compel him to make good the loss sustained by the purchaser, in consequence of the fraudulent statement.

" When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also, as it is conceived, give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution.

" It is very usual for auctioneers to prepare the particulars and conditions of sale; but this a vendor should never permit, as con-

tinual disputes arise from their ignorance of the title to the estate, and their consequent misstatements.

"Where an estate has been in a family for a long time, or the title has not been recently investigated, it might be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it, cleared up, previously to a contract being entered into for sale of the estate.

"By this precaution the vendor will avoid any delay on his part, which might impede the sale from being carried into effect by the time stipulated; and will, in many cases, be preserved the expense necessarily attending tedious discussions of a title.

"Another advantage of this measure is, that if there should be any defect in the title which cannot be cured, it would only be known to the agents and counsel of the vendor, which is of the utmost importance; for it frequently happens, that a defect in a title, by being discovered to persons, not concerned for the vendor, comes to the knowledge of the person interested in taking advantage of it, by which many titles have been disturbed."

ARTICLE II.

Abridgment of the Law of Nisi Prius.

An Abridgment of the Law of Nisi Prius. Parts I. II. III. 3 vols. 8vo. *William P. Farrand and Co. Philadelphia.*

IN works of this nature, the most recent is generally the most valuable. The knavery of dealers and the ingenuity of lawyers are perpetually producing new decisions, which require the industry of compilers. The very excellent work of *Buller*, for which we are indebted to a hint from Mr. Justice *Cline*, will long continue to be among the most valuable volumes in the legal library. But *Espinasse* will probably be superseded by *Selwyn*, because the latter includes the former, besides the subsequent decisions. Whilst we admire the lucid order and laborious industry which are so conspicuous in this abridgment, we cannot but object to the mutiplicity of notes, by which the pages are crowded and the attention of the reader is distracted. Nine tenths of them, in our opinion, should have been incorporated in the text, where they would contribute to the regularity of the system, instead of disfiguring it, like a sheet of paper thrust through a broken pane of glass.

With this single exception, the author is entitled to very great praise, for his able execution of a troublesome task.

[The works which are published by Messrs. *Farrand* and *Co.* are printed by *Fry* and *Kammerer*, and generally in a style of elegance which is unrivalled in this country, and seldom surpassed in *Great Britain.*]

ARTICLE III.

Treatise on Conveyancing.

A Treatise on Conveyancing, with a view to its application to practice; being a series of practical observations, written in a plain familiar style, which have for their object to assist in preparing drafts, and in judging of the operation of deeds, by distinguishing between the formal and essential parts of those deeds &c. in general use, being a course of lectures, with an appendix of select and appropriate precedents. By *Edward Preston*, of the *Inner Temple*, Esq. author of the Elementary Treatise on the Quantity of Estates, &c. &c. 8vo. *Clarke.* 1806. *London.*

THOUGH the practitioner may find nothing in these pages but sound law, and may feel grateful for the forms which constitute the appendix, he will still be of opinion that his obligations would have been considerably enhanced, if Mr. *Preston* had bestowed some pains on digesting and arranging the matter which is here accumulated, without any regard being shown to method or language. When gentlemen appear before the public, even as authors and compilers of law books, we see no reason which releases them from the observance of rules that are binding on writers in other lines. We conceive it to be incumbent on them to give to their compositions all the excellence of which the didactic style is susceptible. *Blackstone* has set the example, and is himself a model in this respect; and in no works can method and perspicuity be more important than in law treatises. It is true that every practising lawyer must have recourse to all the authorities on which text books are founded; and that to him it is not important how they are drawn up, since they serve him for little else than as indices of reference: but we still maintain it to be the duty of an au-

thor to approach as near as he can to perfection in the kind of composition which he attempts.*

ARTICLE IV.

Treatise on Pleading in Civil Actions.

An Elementary Treatise on Pleading in Civil Actions. By *Edward Lawes* of the *Inner Temple*. 8vo. *Brooke*. 1806. *London*.

IN this treatise, we meet with that forceful arrangement and that perspicuity of statement, which constitute the chief merit of performances of this kind; while many observations and hints are here given, which will excite the curiosity and stimulate the researches of the attentive and diligent student. The addition of the specimens of the different style of pleading at different periods was a happy idea, and will much assist the attainment of liberal and enlarged views of what is here termed a science, but which we think is more an art; we mean pleading.

Mr. *Lawes* gives us reason to expect from him a larger book upon this subject. The present specimen makes us strongly wish that he may fulfil his engagement; since we have no doubt of his proving equal to this nice and intricate undertaking, and such a work is a great desideratum. This gentleman is not, we understand, the worthy and very deserving counsel of the same name, who is so well known and esteemed in the king's bench.†

This treatise has been republished in *America* by *Thomas* and *Tappan*, *Portsmouth*, *N. H.*

ARTICLE V.

Practical Points, or, Maxims in Conveyancing.

Practical Points, or, Maxims in Conveyancing, drawn from the daily experience of a very extensive practice. By a late eminent Conveyancer. To which are added Critical Observations on the various and essential parts of a Deed, by the late *J. Ritson*, Esq. 8vo. *Clarke*. *London*.

THE editor of these tracts represents them as containing "a brief but instructive selection of maxims, which the student may turn to great advantage by diligent reading, and

* Monthly Review, 1807.

† Monthly Review, 1807.

to a much greater by interleaving his own copy with writing paper, and making it his common place book." Entertaining such high notions of their importance, he ought, we think, to have bestowed a little more attention on their revisal. The passages here strung together might surely have been copied accurately, references made to the works from which they were borrowed, and the cases specified which support the doctrine; it was not necessary that it should be made known to the public that the compilers were better lawyers than grammarians. The attempt of Mr. *Ritson* was well imagined, and, had it been better executed, it would have proved interesting.*

ARTICLE VI.

Observations on the Rules of Descent.

Observations on the Rules of Descent; and on the Point of Law, whether the brothers of a purchaser's paternal grandmother shall be preferred in the descent, to the brother of the paternal great grandmother of a purchaser? in defence of Mr. Justice *Manwood's* position; and in reply to the advocates for the doctrine of Mr. Justice *Blackstone*. Together with some Reflections on the subject of our Law's Disallowance of Lineal Ascent. By *W. H. Rowe* of *Gray's Inn*, Esq. Conveyancer. 8vo. *pp.* 117. *Clarke* and *Sons. London.*

IF this question be not without practical interest, it principally claims the attention of the student as forming him in the habit of investigating abstruse legal points. Much of the learning that bears on the matters in discussion admits of more useful application.†

* Monthly Review, 1807. † Id.

LITERARY INTELLIGENCE.

BOOKS RECENTLY PUBLISHED.

1. CONSIDERATIONS concerning a Proposal for dividing the Court of Sessions into Classes or Chambers; and for limiting Litigation in small Causes; and for the Revival of Jury Trial in certain civil actions. *pp.* 129. 8vo. London.

2. REMARKS on the Operations and Consequences of the Laws for the recovery of Debts; in a series of Letters addressed to the right honourable the Earl of *Moira*, &c. 8vo. *pp.* 106.

Letter I. is introductory, explaining the motives and plan of the work.

"I wish," says the author, "by a display of the flagrant violation of justice and morality that can be effected under colour of these laws, to enforce the propriety of legislative provision; to demonstrate the necessity of extensive and radical melioration; and to manifest that occasional palliatives "may skin and film the ulcerous parts," but can neither purify nor renovate a vitiated and contaminated system."

Letter II. contains a history of the *Roman* laws relative to debt.

Letter III. after several observations on the effects of credit in this country, the author adverts to the former practice on this subject.

By the practice of the common law, a plaintiff was formerly compelled to produce two sufficient sureties, to testify that he had at least a probable cause of action; and those pledges were amerced if he failed to substantiate his claim. A wise provision which afforded security to the defendant against unjust or trivial actions; and allowed the plaintiff leisure to reflect before he plunged into a tedious and expensive litigation. These pledges to prosecute still remain in form, although the substance has vanished, and the fictitious names of *John Doe* and *Richard Roe*, have long usurped and superseded the use of real, substantial sureties.

In Letter IV. we read that

The places of vulgar resort contiguous to *Sergeant's Inn*, are crowded every evening during term, with a horde of miscreants, who are ready, for a trifling reward, to swear to any fact which may serve the purpose or promote the ends of their employers.

The author, after exposing the facility of illegal arrests, to answer fraudulent purposes, states that a person

May be incarcerated from the month of *August* until *July* in the following year, for an unjust demand, on the solitary unsupported oath of an unprincipled miscreant, if unable to procure bail.

In *Pennsylvania* it is wisely provided that a person who is arrested for debt, may, upon application to a judge at his chambers, have the cause of action investigated, and if it is not properly supported on the part of the plaintiff he is discharged without bail. But in *Maryland* no such law exists. A man may be arrested without any oath and confined more than six months. It is no answer to this, to say that he has a remedy by an action for false imprisonment. He may be too poor to support such action; or his persecutor, even if he be found, may not be worth prosecuting. It is a serious grievance which loudly demands the interposition of the legislature.

Letter V. relates to the custom of procuring hired bail; that is

Inducing, by a stipulated reward, two indigent insolvent persons to swear that they are possessed of property to a considerable amount. The public will reluctantly believe, that this flagitious practice is systematically organized; and that many low attorneys, and desperate, needy miscreants, derive a regular and considerable subsistence from this source of perjury, immorality and injustice. This custom is openly and daringly continued, and persons may now be bailed for any amount, if they will agree to the stipulated exaction of the attorney, who previously makes his own private agreement with the persons that purpose to become bail!

Letter VI. explains various means by which the claims of *bona fide* creditors may be eluded, sham pleas, false demurrers, bills in chancery and writs of error.

Letter VII. relates to the proceedings against prisoners, extortions to which they are exposed.

Letter VIII. contains a summary of the arguments previously used, and hints towards forming a system more effective as it regards creditors, and more lenient as it regards honourable debtors. He presents some striking comparative remarks on the treatment of debtors and of malefactors.

---

3. LETTERS on Capital Punishments, addressed to the *English* Judges, by *Beccaria Anglicus*. 8vo. *London.*

4. MEMOIR of the Case of *John Mason*, Esq. barrister at law, who was confined as a state prisoner in *Kilmaimham* for more than two years; containing Addresses and Letters to the Earl of *Hardwicke*, the Duke of *Bedford*, Mr. *Wickham*, Judge *Daly*, Sir *Evan Nepean*, Judge *Day*, Lord *Henry Petty*, &c. &c. and Letters from some of the above personages, most respectfully submitted to the consideration of the Commons in parliament assembled. 8vo. *London.*

---

5. THE LAWS relating to the Poor. By *Francis Coust*, Esq. of the *Middle Temple*, barrister at law, 3 vols. 8vo. *London.*

In this edition (the fifth) the statutes and cases to *Easter Term*, 1807, are arranged under their respective heads: and the whole system of the poor-laws, including the collections originally made by *E. Bott*, Esq. together with many cases never before published, are placed in a lucid and perspicuous order.

---

6. A COLLECTION of Rules and Standing Orders of the House of Commons, relative to the application for Private Bills &c. with the additional Orders respecting *Ireland*, completed to the session, 14th *August* 1807. 4to. *pp.* 44. *London.*

The orders contained in this useful compilation relate to

Private Bills generally; Inclosures; Turnpike Roads; Navigable Canal; Bridges; Small Debts; Paving, &c. Letters Patent; Divorces; Trade; Religion; Public Money; *Ireland.*

The utility of this work to all who are concerned in parliamentary affairs is very evident: not only to the professional man, who conducts a bill through its several stages, but also to every individual whose interests may be affected by private bills, as much delay will be avoided by those who take the proper steps at the commencement of an application to the legislature.

---

7. THE Law of Charitable Uses, as laid down and digested, by *George Duhe*, Esq. in 1679, together with the learned Readings of Sir *Francis Moore*, printed from his own Manuscript. To which is now added, the Law of *Mortmain*, as established by the statute of 9 *George* II. *cap.* 6. The whole continued to the present time. Enlightened by an Abridgment of all the adjudged Cases, particularly adapted to the use of every Professor of the law, as well as all Bishops, Cathe-

drals, Colleges, Parishes, and all Corporations, ecclesiastical as well as civil; and all Eleemosynary Foundations. By *Richard Whalley Bridgman*, Esq. author of the Analytical Digest in Equity, &c. 8vo. *pp.* 689. *London.*

8. A DETAIL of the Duties of a Deputy Judge Advocate; with Precedents of Forms of the various Documents, used in summoning, assembling and holding a Naval Court Martial; with the Proceedings thereof, to the passing of Sentence; also Records of Sentences, with Cases and Opinions on special Points. By *Robert Liddel*, one of the senior pursers in his majesty's navy, folio. *pp.* 155. *London.*

9. THE whole Proceedings on the Trial of an Information exhibited at the instance of the Honourable the *East India* Company against *R. Henshaw*, Esq. Custom Master of *Bombay* for Corruption, &c. tried by a special jury, in the court of the recorder of *Bombay*, *November* 5, 1805, before Sir *J. Mackintosh*, Knight. *London.*

10. MINUTES of a Court Martial, holden on board his Majesty's Ship, the *Gladiator*, in *Portsmouth* Harbour, on *Monday* the 20th of *July*, 1807, and the following days, for the Trial of Captain *Laroche*. 8vo. *London.*

11. REMARKS, Critical and Miscellaneous, on the Commentaries of Sir *William Blackstone*, by *James Sedgwick*, Esq. barrister at law. 2d. edit. 4to. *pp.* 314. *London.*

"The subjects discussed in this work are taken in the same regular order in which they occur in the Commentaries. The remarks are confined to the first volume. The edition used by the writer is the eighth edition, printed at *Oxford*, at the *Clarendon* press in 1778. This circumstance is mentioned, because, in the postscript to that edition, the author professes to have revised his work, in respect to such particulars as had been held objectionable; "to have retracted or expunged from it whatever appeared to be really erroneous, to have amended or supplied it, when inaccurate or defective; and to have illustrated or explained it, when obscure." To retain all the respect due to the capacity, the learning and

the abilities of Sir *William Blackstone*, cannot be considered as inconsistent with a scrutiny into the truth of the tenets, and the accuracy of the reasonings interspersed throughout his work. The present writer, however, in every instance in which he dissents from him, or from any author, begs to be considered as speaking with becoming deference. The very circumstance of having been frequently impelled to differ from the judgment of others, has taught him greatly to mistrust his own."

"The present writer is aware," says his preface, "that he shall be considered by many as stepping on hallowed ground. It is difficult to avoid the imputation of presumptuousness in controverting on any topic, opinions which fall from high authority; "but to exert reason," as an eminent writer *(Burke)* truly says, "is not to revolt against authority. Reason and authority do not move on the same parallel." The doctrines and first principles contained in an institutionary work can never be too minutely sifted, or too thoroughly discussed. *Abeunt studia in mores.* The different branches of human knowledge, present aspects so infinitely diversified and the views with which their investigation is prosecuted are so various and opposite, that the most subtle reasoning upon them is not always the most sound, nor the plausibility of an opinion, or the renown of those who hold it, at all times a sure touchstone of its truth. To defer to the decision of more enlightened minds, is to pay to learning and to talent the reverence they deserve; but to surrender our reason on any occasion to the authority of a name, is a token rather of a sluggish and feeble intellect, than of genuine humility and real wisdom.

"The deliberate and recorded judgment of men of distinguished station and established fame, cannot fail of being extensively imbibed; its justice or fallacy, therefore, can never be matter of inconsiderable consequence. It has been remarked of the Commentaries, that "they comprise the political and legal science of a majority of *English* senators;" the opinions maintained in them have consequently an extensive *practical* effect. Men standing on this high eminence, *act* on the principles they adopt: and the sacred trust of authority to which they are appointed, is likely to be well or ill discharged, according as these principles are founded in reason or error. They find their way, moreover, into our public ordinances and judiciary decrees; they enter more or less into all the grand

measures of regulative policy in a nation; they affect its interest and its strength; they influence its integrity and its wisdom."

12. SOME Observations on the Constitution and Form of Proceeding of the Court of Sessions in *Scotland;* with Remarks on the Bill for its reform. By *John Peter Grant*, Esq. advocate and barrister at law. 8vo. *pp.* 135. *Edinburgh.*

13. THE Trial of General *Whitelocke;* taken in short hand by Mr. *Guerney;* with a Copy of the excellent Defence. To which is added an Appendix containing General *Whitelocke's* Instructions, and all the other Official Papers produced in court; with a Map of *Buenos Ayres*, and the surrounding country. 2 vols. 8vo. *London.*

14. A STATEMENT of the Evidence and Arguments of Counsel, before the Committee of the House of Commons, on the controverted Election of *Saltash.* By *Samuel Carpenter*, Esq. barrister at law. *London.*

15. A TREATISE on the Law of Distresses. By *J. Bradby.* *London.*

The whole Law relative to the Duty and Office of a Justice of the Peace, comprising also the Authority of Parish Officers, with Precedents and Forms of Proceedings. By *Thomas Walter Williams*, Esq. of the *Inner Temple*, barrister at law. The second edition, considerably enlarged and improved, including the Statutes and adjudged Cases to the present time; with Tables of the Names of Cases, and an Index of the Principal Matters. 4 vols. 8vo. *London.*

Messrs. Munroe, Francis and Parker, have just published a volume of

AMERICAN STATE PAPERS, containing the most important Documents, communicated at different times to Congress by the President.

Contents——President's Message at the first session of the 9th Congress; Report of the Governor of the Michigan Territory; Documents and Papers relative to complaints by France against

the St. Domingo Trade; President's Message relative to the violation of Neutral Rights; Mr. Munroe's Letter to Mr. Madison on the subject; Mr. Gore's Letter to Mr. Madison; Remonstrance by Mr. Munroe to the British Government; Letter from Mr. Madison to Mr. Munroe relative to Impressments of American Seamen; Message communicating Discoveries made by Captains Lewis and Clark, Dr. Sibly and Mr. Dunbar, in the interior, with Historical Sketches of the several Indian Tribes, Red River, &c.; Observations made in a voyage from St. Catharine's Landing to the Hot Springs on the Washita; President's Message at the opening of the 2d Session of the 9th Congress; Reports of the Secretary of the Treasury; Letter from captain Clark of further Discoveries; Messages and Papers giving an account of Burr's Conspiracy; Account of a voyage up the Mississippi by Lieutenant Pike; Message communicating information from different persons respecting Gunboats, &c.; President's Proclamation respecting attack on the Chesapeake; President's Message at the 1st session of the 10th Congress; British Orders of Council, January 10, 1807; Spanish Decree, February 19, 1807; Dutch Decree, August 28, 1807; British Proclamation for recalling seamen, &c. &c.

R. Johnson of New-York, offers for sale

THE TRIAL OF JOHN TYSON, for Criminal Conversation with the wife of William Jeffers, with the whole of the Evidence, and the Speeches of Messrs. King, Fay, Sampson and Wilkins, at full length, with the Charge of the Hon. P. C. Van Wyck, Recorder.—Tried at the last Mayor's Court.—Price 2 shillings.

And also, THE TRIAL OF ALEXANDER M'DOUGALL, for Criminal Conversation with the wife of George Parker, with the Speeches of Messrs. Colden and Wilkins, at full length; tried the same term.—Price 2s.

Mr. Bonnetheau, of Charleston, S. C. proposes to publish in one volume

I. The Proceedings at Charleston, of the Circuit Court of the United States, in the case of Gilchrist and Others *v.* the Collector, on application for a Mandamus.

II. The Opinion of Cæsar A. Rodney, Esq. Attorney General of

the United States, to the President, against the proceedings of that court.

III. The "Microscope," or Independent Examiner, containing Strictures on Mr. Rodney's Opinion, and the unconstitutionality of the Supplementary Embargo Law, in eleven numbers, written by a Gentleman of the Bar of South Carolina.

IV. A very learned Opinion, in opposition to that of Mr. Rodney, addressed to him in a letter by a Gentleman of the Bar in Virginia, under the signature of "*Tullius.*"

V. To conclude with Judge Johnson's Remarks, in answer to Mr. Rodney.

John West, of Boston, has published

THE TRIAL OF CYRUS B. DEAN, for the Murder of Jonathan Armsby and Asa Marsh, before the Supreme Court of Judicature of Vermont, on the 25th of August 1808. Revised and corrected, from the minutes of the Judges.

Judge Workman, of New Orleans, has advertised proposals for publishing

A DIGEST OF THE LAWS OF CASTILE AND THE SPANISH INDIES, with a General View of the Roman Code, on which those laws are founded.

Another publisher, in the same city, has in the press

AN ACCOUNT OF THE TRIAL AND EXECUTION of Major Campbell, for Murder in a Duel. Together with the Memorial of his Wife to the King; and three Letters from the Prisoner. Copied from the last London Edition.

Praxis Supremæ Curiæ Admiralitatis.

THE Editor of this Journal has completed and will speedily publish a translation of the PRAXIS SUPREMÆ CURIÆ ADMIRALITATIS, written by Francis Clerke, who was registrar of the Court of Arches during the reign of Queen Elizabeth. This is almost the only work on the practice of the Admiralty Court, and is esteemed as unquestionable authority at the bar. A transla-

tion of the third edition was published in the year 1722 "for the benefit and use of all such as are concerned in the admiralties of England, all masters of ships, mariners, and other seafaring persons." That edition was printed from a surreptitious copy of Mr. Clerke's MS. and is both incorrect and incomplete. It was not until the year 1798 that justice was done to the author by the publication of a new edition, faithfully collated with two MS. copies in the handwriting of Dr. Wyseman and Dr. Lloyd. To this edition, which has been used in the present translation, many important notes are added, and the translator has taken the liberty of adding others, on the practice and jurisdiction of the District Court of the United States.

An appendix will also be given, which will contain a variety of such precedents as have been established in the English and American Courts of Admiralty Jurisdiction.

INDEX

TO LAW JOURNAL, VOL. I.

Page.

ABANDONMENT. Where there is a complete taking at sea by a belligerent who has taken full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists a total loss. 1

The state of the loss at the time of the abandonment must fix the right of the assured to recover. - 158

A capture by one belligerent from another constitutes a technical total loss, and gives an immediate right to abandon, though the property may be afterwards restored. - - - - - - - - - - 3

So too of an embargo or detention by a foreign friendly power. - - - - - - - - - - *ib.*

If the port to which the vessel is destined be actually blockaded, the assured may abandon as for a total loss. - - - - - - - - - - 144

The going to another port, after being warned away, for the purpose of delivering the goods, does not destroy the right to recover on the abandonment. - - - *ib.*

Vide *Insurance. Notice.*

ACCOUNT, limitation of, ACTIONS of, vid. *Maryland.*

ACTIONS, limitation of, in Maryland, vid. *Maryland.*

ACCEPTANCE, of a Bill of Exchange, what shall be deemed an 486

ACKNOWLEDGMENT OF DEEDS, vid. *Deeds.*

ABSCONDING DEBTOR, to have no benefit of limitations, 427

And vid. *Attachment.*

ADAMS, John Quincy, his report to the senate in the case of John Smith of Ohio. - - - - - - - 459

ADMINISTRATOR AND EXECUTOR, actions on their *bonds* must be prosecuted within twelve years in Maryland. - 427

Actions on claims which have been rejected by them, must be prosecuted within nine months. - - 428

ADMINISTRATOR AND EXECUTOR, may be called upon by the Orphan's Court to file additional security. - 114
Must return an account of their administration within fifteen, or, under permission, eighteen months. - 327
Mode of proceeding on their bonds. - - - *ib.*
ADMIRALTY. How far the Vice Admiralty Courts of Great Britain are bound to notice *Orders in Council.* - 217
Its jurisdiction in Pennsylvania previous to the adoption of the federal constitution. - - - - - 266
Vice Admiralty decisions. - - 53. 217. 221. 338
French Council of Prizes, case of the Horizon. - 312
Historical examination of its civil jurisdiction. - 419
ADVERSARIA. - - - - - - - - - 386
AGENT, his obligations, and remedy against him for making false representations. - - - - - - - 538
ALIENAGE, on the, of persons who went from this country during the revolution and adhered to Great Britain. - 368
ANNUITY. Equity will relieve the purchaser of an annuity where a defective security is given for it. - - - 540
APPEALS must be prosecuted within three years in Maryland. 116
APPEAL BONDS. - - - - - - - - - 326
ARMSTRONG, General, his correspondence with the French and American governments. vid. *State Papers.*
ARBITRATORS have a right to award concerning the costs of a suit referred to them. - - - - - - 367
If they award one fourth of the costs, it is error to give judgment for the whole costs. - - - 373
ARBITRATION, where not affected by the statute of limitations. 428
ASSAULT AND BATTERY, curious cases, - - - 175. 237
Limitation of actions of, - - - - - - 426
ASSETS, the crop growing upon land devised is assets in Maryland. - - - - - - - - - - - 113
ASSUMPSIT, see *Pleadings.*
ATTACHMENT may be issued by the Orphan's Court in Maryland, to compel executors, &c. to account, - 114
Law of South Carolina. - - - - 321. 334
Law of New York. - - - - - - 324
Not warranted by the Civil Law. - - - 324

ATTORNEY, Letter of, how executed in North Carolina. - 417
General, his letter to the President of the U. States. 433
Disturber of public tranquillity. - - - 387
Curious act of Parliament. - - - - 387
Where he binds his principal. - - - - 539
AUCTIONEER. Evils arising from permitting them to prepare the conditions of a sale. - - - - - - - 541
ARREST, in Pennsylvania, a defendant, immediately on his arrest may have the cause of action investigated by a single judge, who may discharge him upon common bail. *Secus* in Maryland. - - - - - - - - - 547

BALTIMORE, Mayor of the City of, how elected. - - 116
BANKRUPT. Under the act to establish an uniform system of Bankruptcy in the United States, all deeds which are made with a view to give a preference to a creditor in exclusion of others or to delay or defraud them, are void, and acts of Bankruptcy. - - - 202
A denial to the sheriff is not an act of Bankruptcy, if the debt upon which the writ was founded be not due. - - - - - - - - - *ib.*
The adjudication of the Commissioners, that the party is a bankrupt, may be supported by other acts, than that upon which the commission is founded, provided they were committed within six months before it was issued. - - - - - - - - - *ib.*
See *Insolvent.*
BANK OF THE UNITED STATES. The President, &c. of this institution, although citizens of Pennsylvania, cannot communicate their right of suing to a corporate body of which they are exclusively members, so as to sue in the Circuit Court of Georgia. - - - - - - - - 263
BAIL, action lies, in Massachusetts, against sheriff for taking insufficient bail. - - - - - - - 367
See *Arrest.*
BAIL-PIECE. See *Exoneretur.*
BASTARD. In Massachusetts, the mother has a right to the custody of it, in preference to the putative father. - - 367
BILL, limitation of action on, - - - - - - 427
What an acceptance of a, - - - - - - 486

BIGAMY, curious case of, - - - - - - 70
BIOGRAPHY, its utility. - - - - - - - 121
Of Sir James Mackintosh. - - - - - 121
Of Lord Keeper Coventry. - - - - - 241
BLACKSTONE, criticised. - - - - - - - 545, 9
BLANK IN POLICY OF INSURANCE, its effect. - - - 215
BLOCKADE. Under the treaty between the United States and Great Britain, the persisting in an intention to enter a blockaded port, unconnected with any fact, is not a just cause of condemnation. - - - - - 139
Vid. *Abandonment.*
Attempt to violate authorizes capture. - - - 148
BLOUNT'S CASE in the Senate of the United States, cited. 471
BONDS, Laws of Maryland relative to, - - - - 326. 427

CAPTURE. Vide *Abandonment.*
Whether a capture on the high seas for a cause not warranted by the Law of Nations, can give jurisdiction to a prize court. - - - - - - - 266
CAROLINA. See *Laws of State.*
CAPIAS AD SATISFACIENDUM, upon executing a, in Maryland, the sheriff is bound to accept the amount of the execution. 111
CARR v. HOOD, Libel. - - - - - - - 309
CASE, Action on the, limitation of, in Maryland. - - 426
CALLAHAN v. HALLOWELL, attachment. Preference. - - 324
CERTIFICATE OF INSOLVENCY. See *Insolvent.*
CHANCELLOR. Vide *Evidence. Injunction.*
CHARTER PARTY, under Admiralty jurisdiction. - - 420
CHAMPAGNY'S CORRESPONDENCE with General Armstrong. 516
CHESAPEAKE, remarks on the attack on the, - - - - 379
CIVIL LAW, extracts from, - - - - - - - 491
CHESTERFIELD, Lord, Anecdote of, - - - - - 380
COALE, EDWARD J. Trial of B. Irvine for a libel on his character. - - - - - - - - - - - 298
COVENTRY ACT, why so called. - - - - - - 241
COUNTY COURTS OF MARYLAND, invested with equity jurisdiction to the amount of 100*l.* with appeal to the Chancellor. - - - - - - - - 327
May try offences committed on the waters of the Chesapeake. - - - - - - - - 119

CODE, JUSTINIAN'S, part of, translated for this Journal. - 491
CONSTRUCTION of Maritime Contracts. - - - 209
Of the term "voyage." - - - - - - 210
CONSTITUTION of the United States does not notice corporate bodies in specifying the jurisdiction of the Circuit Courts. - - - - - - - - - 263
Of Pennsylvania, commented on. - - - 293
CORPORATION. In South Carolina, all returns to attachments made on the part of a corporation, must be under their seal, and not on oath. - - - - - - - - 324
CORRESPONDENCE. See *State Papers.*
COSTS. See *Arbitrators.*
CONDEMNATION. See *Blockade.*
If a vessel be seized for a violation of a municipal law, the manner of instituting proceedings against her must be regulated by the sovereign power of that country whose laws she has infringed: and no foreign court can inquire into the correctness of a condemnation passed in consequence of the seizure, unless the court, by which the adjudication has been made, lose its jurisdiction by some circumstance which the law of nations can notice. - - - - - 139
The court of the captor does not lose its jurisdiction in consequence of the vessel being carried into a neutral port, because she is there in such a place of safety, that a sentence can be passed according to the law of nations. - - - - - - - *ib.*
Where the facts stated in a foreign sentence do not, in themselves, amount to a justifiable cause of condemnation, the cause is open to further evidence. - *ib.*
See *Foreign Sentence.*
COURTS, CIRCUIT. See *Bank. Jurisdiction. Mandamus. Regula.*
CONSULAR or Consuls. - - - - - - - 421
COLLECTORS, not bound to obey illegal instructions. - - 429
See *Mandamus.*
CONVEYANCING, Ritson and Preston on, reviewed. - 543, 4
CLIVE, Lord, gave the first hint of Buller's Nisi Prius. - 542
CLERKE'S PRAXIS, new translation of, - - - - 553

DAW v. The Earl of Chatham. Devise. - - - - 41
DANA, Chief Justice, his resignation. - - - - 366

DEEDS, how executed, in Maryland. - - - - - 94
What, fraudulent. - - - - - - - 202
North Carolina. - - - - - - - 417
DEBT, action of debt, limitation of, in Maryland. - - 426
On recognizance for good behaviour, without previous indictment, in Pennsylvania. - - - - - 287
Qu. in Virginia?
DEFAULT, in appearing to answer bill in equity in the Circuit Court of Maryland, consequence of, - - - - - 485
DEFECTS *patent* and *latent* in a title, rules respecting, - 537
DESPATCH Galley, cited. - - - - - 406
DESTINATION of vessel, should be inserted in the policy. 215
If not, the insured suffers in case of loss. - - *ib.*
DETINUE, action of, limitation of, in Maryland. - - 426
DIGEST, Justinian's, part of, translated for this Journal. - 491
DEVISE. Where the words of a will would give an estate tail in a freehold, the same words applied to a personal estate will pass the whole interest; and as, by a devise of rents and profits, lands will pass, so a devise of the dividends of bank stock, is of equal import with a devise of the stock itself. - - - 41
Executory, doctrine of, discussed. - - - 366
DUTIES. The section of the act of Congress for the collection of duties, which creates certain forfeitures, does not comprehend wrecked goods, nor those found on board a vessel deserted by her crew, and in such a situation as to render immediate landing necessary. 251
Nor will the landing under such circumstance, without a permit, work a forfeiture. - - - - - *ib.*
The same rule applies to the removal of them from the particular place where they are first landed. *ib.*

EXECUTOR, see *Administrator*.
EQUITY jurisdiction of County Courts in Maryland. - - 327
Bill in, in the Circuit Court of Maryland, proceedings when the defendant does not appear or does not answer. - - - - - - - - - 485
Grants relief against fraudulent representations. - 541
ERROR, writ of, must be prosecuted, in Maryland, within three years. - - - - - - 116
Cases on appeal bonds. - - - 326

ERROR. In the court to give judgment for the full costs of court on an award giving only three fourths. - - 372

EVIDENCE, opinions of the twelves judges of England on a point in the law of, - - - - - 223

Where the Chancellor of Maryland has ordered the production of books by a certain day and they are not produced, nor cause shown within four days after the period, the allegations of the adverse party are taken *pro confesso*. - - - - 115

Manner of producing, in the Circuit Court of Maryland. 484

EMBARGO. Resolution of the Maryland Legislature *approving* the, - - - - - 120

The oppressive effects of an - - - 182

An injunction granted in Georgia, to *prevent the ruinous effects* of the. - - - - - - 182

Cases arising under the Embargo Act and its supplements. - - - - - - 429. 482, 8

EXPULSION. The power of the Senate and the manner in which it should be exercised. - - - - 463. 471

EXONERETUR. The Circuit Court of Maryland will not on motion enter an *exoneretur* on the bail piece, in an action instituted in that court by a subject of Great Britain, against a person who had obtained a discharge under the insolvent law of the state. - 260

FEMES COVERT. See *Deeds, Limitations.*

FOREIGN SENTENCE. See *Condemnation.* See p. 142. *in note.*

The sentence of a foreign Court of Admiralty of competent jurisdiction, condemning property on the ground of not being neutral, is so entirely conclusive, that the fact cannot afterwards be controverted in any court having concurrent jurisdiction. - 148

Points decided in New York on this head. - 157

FORFEITURES. See *Duties.*

Imposed by the act for the regulation of officers' fees in Maryland, must be prosecuted within one year. 428

GUARDIANS. In Maryland may be compelled to give counter security, if required by the first surety. - - 114

Lease of land by an infant's father, as his natural guardian, is void in Massachusetts. - - 366

Good Behaviour. See *Recognizance.*
Grimstone, Sir Harbottle, quaintness of, - - 387
Gilchrist et al. *v.* Collector of Charleston. - 429
Goss *v.* Withers, cited. - - - - - 403
Guidon le, cited. - - - - - 403
Gaius, translated. - - - - - 493, 4

Habeas Corpus. See *Recognizance.*
Harper, Robert G. his speech in favour of John Smith. 470
Horizon, case of the, - - - - 312
Honest Politician. - - - - 374
Hatton, Lord Chancellor, his wit. - - - 387
Hamilton *v.* Mendez, cited. - - - 404, 6

Indictment. Vid. *County Courts.*
Jefferson's Message to Congress. See *State Papers.*
Insurance. Vid. *Abandonment, Total Loss. Valued* and *Wager Policy. Warrants. Blockade,* &c.
If the risk do not commence the premium must be returned. - - - - - 36
Insurance Company incorporated in Baltimore 105
Insolvent Laws of Maryland. - - - 95
Insolvent. The proper way of bringing the certificate of discharge, before the court, is by plea. - 260
The certificate is not conclusive evidence that the discharge was duly obtained. - - - 260
Injunction, defined. - - - - - - 183
Chancery will stay sales under an execution in cases of peculiar hardship, in Georgia. - - - 183
Will not stay execution on judgment obtained by surprise: but it is not precluded from exercising an equity jurisdiction over the verdict. - - 305
Incumbrance. See *Defect.*
Instance Court, its jurisdiction examined. - - 419
Infant, See Guardian.
Instructions, from the Secretary of the Treasury which are not supported by law are illegal and no inferior officer is bound to obey them. - - - - - - 429
Innkeepers, their duties and obligations by the Civil Law. 491

INTENTION, how far it shall control the rules of law in the construction of devises. - - - - - - - 189
IRVINE BAPTIST, a factious printer, convicted of a libel. - 298
INTEREST, rate of, in Maryland. - - - - - 326
INQUISITION, of Queensborough. - - - - - 422
JOHNSON, Judge, his opinion on the power of the Circuit Court to grant writs of mandamus. - - - - - - 431
JURISDICTION, of the Circuit Courts. - - 263, 429
Admiralty Court in Pennsylvania previous to the establishment of the District Courts. - - 266
Of the County Courts in Maryland in Equity Cases. 327
Of the Instance Court. - - - 419
Quære, as to the extent of the Admiralty Jurisdiction of the United States. - - - 426
JUSTINIAN'S DIGEST AND CODE, translated. - - 491

LAWS OF THE UNITED STATES, expounded.
2d March 1799. *Duties.* - - - - 251
Constitution Art. III. §. *Judicial Powers.* - 263
Treason. - - 344
3d March 1808. *Foreign Vessels.* - - - 382
Of PENNSYLVANIA *Admiralty.* - - 266
Recognizance for the peace good behaviour. - 168, 287
Bail. - - - - - - 547
Of MARYLAND. See *Maryland.*
Of MASSACHUSETTS. *See Tyng's Reports.*
Of NEW YORK. *Attachment Law.* - - - 407
Of SOUTH CAROLINA. - - - *ib.* 321
Of NORTH CAROLINA. - - - *ib.* 417
Of GEORGIA, *Injunction. Chancery.* - - - 183
LAWES ON PLEADING, Reviewed. - - - 544
LEVY COURT. See *Laws.*
LIMITATIONS in *Massachusetts.* The statute of limitations of New York cannot be pleaded in bar to an action on a promissory note made and payable in that state, the plaintiff being an inhabitant of that state and the defendant of Massachusetts. - - - 369
Of Actions in Maryland. - - - - 333, 426
LANDS, location of, in Maryland. - - - 428
LEGACY, when payable in Maryland. - - 327

LIBEL, Essay on the Structure of a - - - - - 81
See *Duane*, 168. *Cobbett*, 287. *Irvine*, 298. *Hood*, 309. *Hopkins*, 480.
LITTLE'S, DR. Case. - - - - - - 237
LENOX *v.* HALLOWELL. Attachment. Charleston S. C. - 324
LE CAUX *v.* EDEN, quoted. - - - 420
LITERARY INTELLIGENCE, See *Review* and the concluding pages of each number.

MACKINTOSH, SIR JAMES, Memoirs of - - - 122
MARYLAND, Laws relative to Levy Court 90, 112. the manner of executing deeds, by persons in or out of the state. 91. Insolvent Debtors 95, 260, 203. Fire Insurance Company in Baltimore 105. *per diem* of jurors 109. Capias ad Satisfaciendum 111. Crop on Land of deceased person. Assets. Guardian. Orphan's Court. Register 113. Chancellor. Evidence 115. Appeals and Writs of Error 116. Mayor of Baltimore 116. and other officers of the corporation 117. Negroes 119. Crimes committed on the Chesapeake Bay 119. Libels 298. Interest on Loans and on Judgment Bonds 326. Jurisdiction of the County Courts in Cases of Equity 327. Executor 327, 113. Execution 328. Judgment 326, 328. Chancellor 329. Attorney 329. How to give effect to assignments &c. made by persons residing out of the state 329. Mortgage Assignee 330, 3. Trustee 331. Copies of records from other states how to be authenticated 331. Limitations of Actions 333, 484.
MASTER OF ROLLS. - - - - - - 189
Obligation of, by the Civil Law. - - 491
MAYOR OF BALTIMORE, how elected. - - - - 116
MARINERS' CONTRACTS, on the construction of, - 209
Their obligations by the Civil Law. - 419, 491
MARQUE, letters of, in Pennsylvania. - - 266
MARKING AND BOUNDING lands. See *Lands*. - 428
MADISON'S MR. Correspondence with General Armstrong. 505
MANSFIELD LORD, his wit. - - - - - - 388
MANDAMUS, lies from the Circuit Court. - - - 132
MARBURY'S case quoted. - - - 435
MATERIAL MEN, contracts with, - - - 420
MAXIMS. - - - - - - - - 321, 537, &c.

M'Kim *v.* Smith and Steene, Bill of Exchange. Acceptance. 487
Ministerial Officer, what, a - - - - - 452
Massachusetts Reports reviewed. - - 360
Decisions in, - - - - - *ib.*
Murder of a Slave, punished in South Carolina by a fine. 67
Message from the President of the United States. - 497

Neutrals. The trade of neutrals between the mother country and her colonies is unlawful. - - - - 53
A fraudulent stoppage in an intermediate neutral port to break the continuity of a voyage, which, if continuous would be illegal, must subject the party to the same penalties as the continuous voyage itself. 221
Duty of, 374. See *Blockade.*
Negro, in Maryland, must receive his certificate of manumission from the clerk or register of the county. - 119
Nations, Law of - - - - - - 374
North, Lord Keeper, Biography of - - - 388
Carolina, Attachment Law of. Proof of Deeds. Power of Attorney. - - - - - 417

Orphan's Court, in Maryland. See *Maryland.*
Orders in Council. - - - - 217
Obstruction of process. - - - 232

Partial and Total Loss. Vid. *Abandonment. Insurance.*
The state of the loss at the time of the abandonment is the proper and safe criterion of the rights of the parties. - - - - - 1, 158
When a final decree of restitution takes place, the technical loss ceases to be total. - - 158
Parsons, Theophilus, succeeds Judge Dana. - 366
Paulus translated. - - - - 494
Passengers, master answerable for. - - - 492
Pennsylvania.
Laws respecting recognizance for good behaviour and the peace. - - - - 168, 287
Admiralty jurisdiction in. - - - - 266
Bail. - - - - - 547
Penalties, in Maryland, limitation of actions for - 428

PERRIN *v.* BLAKE, Estate Tail. - 89
PECK *v.* RANDALL, Attachment. Cited. - - 413
PERMIT. See *Duties.*
PINKNEY's opinion on a will. - - - 339
POLICY, blank in, 216. See *Valued Policy.*
PLEADING, question on a point in - - - - 367
Lawe's essay on, reviewed. - - - 544.
See *Replication. Limitations.*
PRESCRIPTION, for a way is not good if it does not say *à quo termino ad quem.* - - - - - - 214
PRESIDENT'S MESSAGE to Congress. - - - 454, 97
PRESTON'S Treatise on Conveyancing, reviewed. - 548
PROCLAMATION respecting the Chesapeake, examined. 382
PRIZE COURTS, their Jurisdiction. - - - - 280
PURCHASERS, Hints to - - - - 538
PROHIBITIONS from Common Law to Admiralty. - 419

QUALIFICATIONS of a Senator. - - - 463

RECOGNIZANCE. See *Pennsylvania.*
REPLEVIN, limitation of, in Maryland. - - 426
REPLICATION, question respecting - - - - 367
RESOURCE, case of the, at Charleston. - - 439
REGULA of Circuit Court. - - - - - 484
RELIEF, in what cases purchasers may obtain - - 538
RECORDS, how to be authenticated in Maryland. - 331
RODNEY, CÆSAR, Remarks on the Mandamus case at Charleston. - - - - - - 433
REVIEW. Tyng's Reports in Massachusetts. - - 361
The Honest Politician. - - - 374
Sugden's Law of Vendors and Purchasers of Estates. 536
Selwynn's Nisi Prius. - - - - 542
Preston's Treatise on Conveyancing. - - 543
Lawe's Treatise on Pleading in Civil Actions. - 544
Ritson's Practical Points, or Maxims in Conveyancing. *ib.*
Rowe's Observations on the Rules of Descent. - 545

SALVAGE. See *Duties.*
SAILORS. See *Mariners.*
SENATE UNITED STATES, its Powers of Expulsion and Rules of evidence. - - - - - - - - 459

SERVANT, Obligations of Master for - - 494
SARAH, GALLEY, case cited. - - - 405
SECURITY. See *Guardian* and *Executor*.
SEIZURE. A Sovereign cannot authorize the seizure of a person, not a subject, nor of a vessel, not the property of a subject, on the high seas for the breach of a municipal regulation. - - - - 23
SLATER, eloquent sentence pronounced upon him. - 66
SMITH'S JOHN, case before the Senate. - - 459
STABLE KEEPERS, their obligations by the Civil Law. 491
STATE PAPERS, AMERICAN. - - - - - 497
STOLEN GOODS. Where goods are stolen in another state and received in Massachusetts, the party receiving them may be indicted there. - - - - - 365
SHERIFF, action lies against him for taking insufficient bail in Massachusetts. - - - - 427
In Maryland, must indorse the consideration upon instruments taken by him. - - - 427
Limitation of Actions on his bond in Maryland. - 427
SUGDEN'S LAW OF VENDORS, reviewed. - - - 537
SELWYN'S NISI PRIUS, reviewed. - - - - 542

TOTAL. Vide *Partial Loss*.
TESTATOR. See *Intention*.
TESTAMENTARY BONDS in Maryland. - - - 334
TILGHMAN, Chief Justice, opinions and charges of, 168, 232, 287.
TRESPASS, limitation of actions of, in Maryland. - 426
TROVER, - - - - - *ib.*
TREATY, between Great Britain and the United States expounded. - - - - - - - - 139
Between France and the United States expounded. 312
TREASON in the United States, essay on the Law of - 344
TYNG'S REPORTS, in Massachusetts, reviewed. - 361
TRUSTEE, his duties. - - - - 541

VALUED POLICY. Where a vessel was insured by a Valued Policy at 6000 dollars, and there was a prior insurance for 4000 dollars, in the event of a partial loss, the assured was allowed to recover, on the second policy an average loss and return premium on 2000 dollars. 160

VALUED POLICY. Vessel valued at 2000 dollars and insured for that sum, and there was a prior insurance for 3000 dollars, the insured was permitted to prove the vessel worth enough to cover both policies. - 164
VOYAGE, import of the term 209, continuity of, - - 221
ULPIAN translated. - - - - 490, 3, 6

WILDS, Judge, eloquent sentence pronounced by him. - 67
WILLS. See *Maryland*.
WARRANTY. A foreign sentence of condemnation, showing on the face of it that there was not justifiable cause, does not falsify a warranty of neutrality. - - - 139
WAGER POLICY, its validity questioned. - - 364
WRECK. See *Duties*.
WATER CARRIERS, or *vectores*, their responsibility. - 493
WORDS, actions for, limitation of, in Maryland. - 426

ERRATA.

Page 397, for *Esperance* read *Insurance*.
542, line 28, for *Cline* read *Clive*.
543, omit the brackets.